SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 376.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CORA WELCH AND DAVID WELCH, HER HUSBAND, JESSE WILSON, ELLA WILSON BROWN, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

INDEX.

	Original.	Print.
Caption	a	1
Petition	2	1
Summons	5	3
Return on summons	5	3
Order filing general and special demurrer, etc	6	4
Demurrer, general and special	6	4
Motion to strike	7	4
Order submitting motion and filing answer	8	5
Order continuing	8–9	5
Order of trial of case	9	5
Order filing amended petition	9	6
Amended petition	10	6
Order submitting generally—time to brief	11	6
Judgment	12	7
Opinion	12	7
Order filing petition making new parties	13	8
Petition of Jesse Wilson et al	13	8
Exhibit 1. Appointment of guardian, etc	16	10
Amended petition	22	13
Final judgment	24	14
Motion and grounds for new trial	25	14

	Original.	Print.
Motion to make findings more specific	26	15
Order filing motion	26	15
Additional finding of fact	27	15
Order sustaining motion for additional findings	28	16
Petition for writ of error	29	16
Assignment of errors	30	17
Order allowing writ of error	31	18
Writ of error	33	18
Citation and service	36	19
Præcipe for record	37	19
Clerk's certificate	38	20

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
CORA WELCH AND DAVID WELCH, HER HUSBAND, DEFENDANTS IN ERROR.

Honorable A. M. J. COCHRAN, *Judge.*

Writ of error from the United States Circuit Court for the Sixth Judicial Circuit and Eastern District of Kentucky at Richmond, Kentucky, to the Supreme Court of the United States of America.

Hon. JAMES H. TINSLEY,
Covington, Kentucky,
Attorney for Plaintiff in Error.

JOUETT, BYRD & JOUETT,
BECKNER & JOUETT,
Winchester, Kentucky,
Attorneys for Defendants in Error.

1 Proceedings had in the Circuit Court of the United States for the Eastern District of Kentucky, at a regular term begun and held in Federal Court Hall, in the city of Richmond, Kentucky, on November 11th, A. D. 1907, and of the Independence of the United States the 132d year.

Court met. Present: Hon. A. M. J. Cochran, Judge.

CORA WELCH ET AL., PLAINTIFFS,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT.

Be it remembered that heretofore, to wit, on February 21st, A. D. 1905, a petition was filed herein, same being in words and figures as follows, viz:

2 United States Circuit Court, Eastern District of Kentucky, sitting at Richmond.

CORA WELCH & DAVID WELCH, HER HUSBAND, PLAINTIFFS,
petition,
vs.
UNITED STATES OF AMERICA, DEFENDANT.
No. 46.

The plaintiffs, Cora and David Welch, state that they are husband and wife and have for many years past resided, and now reside, in the county of Clark and State of Kentucky. They state that the plaintiff, Cora Welch, is the owner and in possession of a farm with dwelling and other improvements thereon situated on the north side

of the Kentucky River at the mouth of, and on the east side of Four Mile Creek. They say that said farm consists of one hundred and fifteen acres of land of which about fifty acres is bottom land and the rest is hilly land.

Plaintiffs state that in the year 1904 the defendant, United States of America, by its officers and agents constructed a lock and dam at and across the Kentucky River at a point near the village of Valley View, which is about twenty miles below the plaintiff's farm whereby the waters of the river were dammed up to such an extent as to raise the natural level of the stream at the plaintiff's farm when the pool was full to the extent of about seven feet. They say that said damming of the stream did no especial injury to their farm
3 but thereafter, in the year 1904, the defendant in like manner, by its officers and agents, constructed another lock and dam upon and across said Kentucky River at a point about three miles below the plaintiff's farm, the effect of which was to further obstruct and dam the waters of said stream to such an extent as to raise the height of the still, or slack, water caused by the Valley View dam to the height of seventeen feet more, making a total rise in the height of the dammed water at the plaintiff's farm of about twenty-four feet.

Plaintiffs state that the effect of the pool or body of still water caused by said dam was to back up the waters of said river into the mouth of, and up, the aforesaid Four Mile Creek to a distance of about three-fourths of a mile causing it to back into, and upon, plaintiff's land; that said pool is thus backed up into the said creek and upon the lands of plaintiff to such an extent that during the ordinary stage of water at least three acres of plaintiff's farm is covered by the water of said pool and is thereby rendered entirely useless for any purpose whatever. They say that said land was, and is, the most valuable land in their farm owing to its extreme fertility and they say that the same is reasonably worth the sum of $100.00 per acre so that they have been damaged by its destruction in said sum of at least three hundred dollars.

Plaintiffs say that the town of Ford, which is about three miles distant from their farm, is the nearest post-office and the nearest place to which they haul their crops and go for other business of all kinds, the only other town accessible to said farm being Winchester, which is about eleven miles distant and the road to which is, for a greater porton of it, very rough and difficult, and during the
4 winter season almost impassable. They state that a county road extends along one side of plaintiff's farm to the town of Ford and furnishes the only way by which plaintiffs can travel to said town, but they say that their own roadway leading from their farm to said county road crosses the aforesaid Four Mile Creek at a point which has been so overflowed and covered with water by reason of the above-mentioned lock and dam that it is utterly impossible to cross it, the water at that point being about fifteen feet deep, whereas

before the erection of said dam there was practically no water in said creek and no difficulty in crossing at that point. They say further that owing to the topography of the ground at that point and the nearness of the cliffs it is impossible for their roadway to the county road to be changed so as to permit them to cross said creek at any point further up the same, and that they are thereby entirely and permanently cut off from any access whatever to the aforesaid Ford county road. They say that in order to reach the town of Ford it is, and will always be, necessary for plaintiffs and the future owners of said land, to use another road leading out of the other end of the farm which passes by a very difficult and circuitous route and which makes the distance for traveling five miles greater to said town, thus causing them to travel and to haul their produce a distance of eight miles instead of three to reach said town. They say that the effect of this cutting off of said farm is to render it less valuable and to damage it in the sum of at least seventeen hundred dollars.

Wherefore the plaintiffs pray that from the facts and law of
5 this case the plaintiff, Cora Welch, recover judgment against the United States of America for the sum of two thousand dollars and her costs herein expended.

BECKNER & JOUETT,
Attorneys for Plaintiffs.

STATE OF KENTUCKY,
County of Clark.

Affiant, David Welch, states that he is one of the plaintiffs in this action and that the statements of the foregoing petition are true as he verily believes.

DAVID WELCH.

Subscribed and sworn to before me by David Welch, this 18th day of February, 1905.

My commission expires Oct. 8, 1908.

[SEAL.]

C. C. PAGE,
Notary Public, Clark Co., Ky.

And on the same day, to wit, on February 21st, A. D. 1905, a certified copy of the foregoing petition was issued herein as a summons.

And on a day following, to wit, on February 25th, A. D. 1905, said summons was returned and filed, endorsed as follows:

"The affiant, S. G. Sharp, U. S. marshal of the Eastern District of Kentucky, says that he executed the within petition by delivering a true copy of same to J. H. Tinsley, U. S. district attorney for said district at his office in Covington, Kentucky, this 24th day of February, 1905.

"S. G. SHARP, *U. S. Marshal.*

"Marshal's fee, $2.00.

"Subscribed and sworn to before me by S. G. Sharp, U. S. marshal for the Eastern District of Ky., this 24th Feb., 1905.

"JOS. C. FINNELL,
"*Clerk U. S. Court.*"

6 And on a day following, to wit, on April 10th, A. D. 1905, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

This day comes the defendant by its attorney, J. H. Tinsley, and filed a general and special demurrer to certain parts of the petition filed herein, and also a motion to strike out certain parts of same, also moved the court for time to answer till Oct. 1st, 1905, for the reason that a proper survey can not be made till low stage of water is in Kentucky River.

The court takes time on said demurrer and motion till the 1st day of the Richmond term of this court, 1905.

And on the same day, to wit, on April 10th, A. D. 1905, the demurrer general and special was filed herein, same being in words and figures as follows, viz:

United States Circuit Court, 6th Circuit and Eastern District of Kentucky.

CORA WELCH ET AL. *vs.* THE UNITED STATES, DEFENDANT.	Demurrer general and special.

7 The defendant, the United States, by its attorney, J. H. Tinsley, demurs to that part of the plaintiff's petition filed herein in which damages are claimed for being deprived of the use of a road leading to Ford, Kentucky. Generally because the facts therein stated do not authorize a recovery.

Specially because the court has no jurisdiction of the matter thus named.

J. H. TINSLEY, *U. S. Attorney.*

And on the same day, to wit, on April 10th, A. D. 1905, the motion mentioned in the foregoing order was filed herein, same being in words and figures as follows, viz:

United States Circuit Court, 6th Circuit and Eastern District of Kentucky.

CORA WELCH ET AL., PLAINTIFFS, *vs.* THE UNITED STATES, DEFENDANT.	Motion to strike.

Comes now the defendant by its attorney, J. H. Tinsley, and moves the court to strike from plaintiffs' petition all that part beginning with the words plaintiff on the second page, line 20, down to the

prayer on the last page, being all that part claiming damages for loss of a road through plaintiffs' land to the town of Ford, Kentucky. Because same is not a proper element of damages to be considered by the court.

J. H. TINSLEY, *U. S. Attorney.*

8 And on a day following, to wit, on April 24th, A. D. 1905, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

On motion of defendant the general and special demurrer and the motion to strike out filed herein in vacation are now noted of record and said motion and demurrer are submitted. And the court not being fully advised, takes time. On the further motion of the defendant by its attorney, the court being advised, it is given until October 1st, 1905, to file answer herein. By consent of parties, the court being advised, it is now ordered that this case be and same is continued generally until the next regular term of this court.

And on a day following, to wit, on November 13th, A. D. 1905, an entry was made upon the journal as follows:

Order.

This cause coming on to be heard came the parties by their respective attorneys and upon their joint motion, the court being advised, it is now ordered that this case be and same is continued until the next regular term of this court.

And on a day following, to wit, November 12th, A. D. 1906, an order was made and entered herein, same being in words and figures as follows, viz:

9 *Order.*

By consent of parties, the court being advised, it is now ordered that this case be and same is continued generally until the next regular term of this court.

And on a day following, to wit, on April 25th, A. D. 1907, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

This cause coming on for hearing, came the plaintiff, having as her attorney Beckner & Jouett, and came the defendant, by J. H. Tinsley, its attorney. Both sides having announced ready and the trial being before the court without the intervention of a jury, the plaintiff proceeded with the introduction of her evidence. The hour of ten-thirty p. m. having arrived and plaintiff not having com-

pleted her case, further consideration of matters herein is continued until Friday, April 26th, 1907, at 7.30 p. m.

And on a day following, to wit, on April 26th, A. D. 1907, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

This day came the plaintiff, by her attorney, and tendered and offered to file an amended petition, to the filing of which the de-
10 fendant, by its attorney, J. H. Tinsley, comes and objects.

The court, being advised, overrules said objection and orders said amended petition to be filed, to which ruling defendant excepts. On motion of the defendant it is ordered that all affirmative allegations of said amended petition be and same are traversed of record.

And on the same day, to wit, on April 26th, A. D. 1907, the amended petition mentioned in the foregoing order was filed herein, same being in words and figures as follows, viz:

United States Circuit Court, Eastern District of Kentucky, sitting at Richmond.

CORA WELCH & DAVID WELCH, plaintiffs, *vs.* UNITED STATES OF AMERICA, defendant.	Amended petition.

Plaintiffs for amendment to their petition herein say that the three acres of land referred to in said petition as covered by the water from the pool caused by Dam No. 10 is reasonably worth the sum of $150.00 per acre, and that they have been damaged in at least the sum of four hundred and fifty dollars by its being covered as aforesaid, and thereby appropriated by defendant.

Plaintiffs say further that their own roadway, referred to in said petition as leading to the county road, is, and was when
11 said dam was erected, a valuable part of plaintiffs' farm, described in said petition, and that its obstruction and destruction, as set out in the petition herein, took from said farm a material part of the value of said farm.

And having amended, plaintiffs that they be allowed $450.00 for the land covered as aforesaid by said water and for judgment for the sum of $2,000.00 and costs, and for all proper relief.

BECKNER & JOUETT.

Affiant, David Welch, says that he is one of the plaintiffs herein, and that he believes the statements of foregoing amended petition to be true.

Sworn to before me by David Welch this April 26, 1907.

And on the same day, to wit, on April 26th, A. D. 1907, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

All evidence having been heard by the court, and attorneys for both plaintiff and defendant having announced that they had nothing further to say, this case is now submitted generally, and it is ordered that the parties hereto have a reasonable time to file briefs.

12 And on a day following, to wit, on November 11th, A. D. 1907, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

This cause having been heard and submitted to the court upon the law and the facts, the court having considered same and being now fully advised, files herein its findings of fact and conclusions of law, upon which it is ordered, adjudged, and decreed that the plaintiffs, Cora Welch and David Welch, have and recover of the defendant, United States of America, the sum of three hundred dollars for the three acres of land taken, and the further sum of $1,700.00 for the damage to right of way and their costs herein had and expended, to be taxed by the clerk. Came the defendant, the United States of America, by its attorney, J. H. Tinsley, and excepted to the foregoing order, judgment, and decree.

And on the same day, to wit, on November 11th, A. D. 1907, the opinion mentioned in the foregoing order was filed herein, same being in words and figures as follows, viz:

United States Circuit Court, Eastern District of Kentucky.

CORA WELCH ET AL., PLAINTIFF,
vs.
UNITED STATES OF AMERICA, DEFENDANT.

12½ That the court has jurisdiction of the cause under the act of March 3, 1887 (24 Stat., 505), is settled by the decision of the Supreme Court in the case of the United States vs. Lynch 188 U. S., 445. The property taken is three acres of bottom land and the right of way over the Sewell land to the county road.

The amount of damages claimed is $2,000.00. In the original petition it was claimed that $300.00 or $100.00 per acre was on account of the three acres and $1,700.00 on account of the right of way. By an amended petition $450.00 was claimed on account of the three acres.

The proof establishes that the whole place before the dam was built was worth $4,000.00 and all the witnesses testify that it was

damaged by the construction of the dam, one-half or $2,000.00. There is no evidence to the contrary. It is only a distribution of the amount then that has to be made. In the original petition the plaintiff claimed $100.00 an acre for the three acres taken. I think when you compare the valuation of the whole place with the amount of bottom land in all $100.00 an acre is ample notwithstanding the high values placed by the witnesses.

I therefore allow the plaintiffs $300.00 for the three acres and $1,700.00 for the right of way. I fear that this is quite liberal, but I am shut up to it by the evidence.

A. M. J. COCHRAN, *Judge.*

Nov. 11, 1907.

And on a day following, to wit, on November 14, 1907, an order was made and entered herein, same being in words and figures as follows, viz:

13 *Order.*

This day came the petitioners, Jesse Wilson, Ella Wilson Brown, Gordon Wilson, and Nettie Wilson, all infants who sue by M. T. McEldowney, their statutory guardian, and tendered and offered to file their petition to be made parties plaintiff hereto, and the plaintiffs consenting thereto said pleading is filed and said petitioners are made parties plaintiff.

On motion of E. S. Jouett, attorney for plaintiffs and for said petitioners, it is ordered that the order of submission heretofore entered herein be, and it is hereby, set aside, and that the written opinion heretofore filed herein be, and it is, now withdrawn.

And on a day following, to wit, on November 14th, A. D. 1907, a petition was filed herein, same being in words and figures as follows, viz:

United States Circuit Court Eastern District of Kentucky.

CORA WELCH, ETC., PLAINTIFFS, PETITION OF JESSE WILSON, Ella Wilson Brown, Gordon Wilson and Nettie Wilson, infants who sue by their statutory guardian, M. T. McEldowney, guardian for said infants,

vs.

UNITED STATES OF AMERICA, DEFENDANT.

Petitioners, Jesse Wilson, Ella Wilson Brown, Gordon Wilson, and Nettie Wilson, all of whom are infants who sue by
14 M. T. McEldowney, their statutory guardian, M. T. McEldowney as guardian for said infants, and Thomas Brown, husband of the infant petitioner, Ella Wilson Brown, say that by proper orders of the County Court of Clark County, which is the

county of their residence, the said petitioner, M. T. McEldowney, was heretofore duly appointed the statutory guardian for the petitioners, Jesse Wilson, Ella Wilson Brown, Gordon Wilson, and Nettie Wilson; and that he thereupon gave bond and qualified as such guardian and ever since said time has been, and now is, acting in that capacity. A certified copy of his order of appointment is filed herewith as part hereof marked Exhibit No. 1 for identity. They say that said Ella Wilson Brown was formerly Ella Wilson, having married her copetitioner, Thomas Brown.

Petitioners say that the said infant petitioners, Jesse Wilson, Ella Wilson Brown, Gordon Wilson, and Nettie Wilson are, and were at the time this action was instituted, joint owners with plaintiff, Cora Welch, in the proportions hereinafter named, of the land described in the petition by inheritance from one John F. Wilson who owned said land at the time of his death, and who was the father of said infant petitioners, and the wife of said Cora Welch, she, after his death, having married her coplaintiff, David Welch. They say that at the time of said John F. Wilson's death said land was part of a tract of about 232 acres which was owned jointly by said Wilson and one W. B. Kidd, and that after said Wilson's death a suit for the partition thereof was instituted in the Clark Circuit Court, in which said land was divided into two equal parts, one of which, being that described in the petition, was conveyed by the master
15 commissioner of said court in the following proportions, to wit: An undivided one-third therein for her life to said Cora Welch for her dower with the remainder interest in said one-third and the fee simple estate in the other two-thirds to petitioners, Jesse Wilson, Ella Wilson Brown, Gordon Wilson, and Nettie Wilson jointly. A certified copy of said deed is filed herewith as a part hereof marked Exhibit No. 2 for identity.

Petitioners say that they are informed, believe and allege that this suit was instituted in the name of said Cora Welch alone through mistake of counsel as to how the title to said land was held; but they say that they are necessary parties hereto and they file this petition to be made parties in order that the above-mentioned mistake may be corrected and the court be enabled to properly determine this litigation with due regard to the interest of all parties interested in the subject matter thereof.

Petitioners hereby reiterate and adopt all of the allegations of plaintiffs' petition and other pleadings in this action, except as hereinabove corrected, as fully as if incorporated herein verbatim. They hereby consent that the order of submission herein be set aside and that this case be at once resubmitted to the court for a judgment upon the evidence presented herein upon the former hearing of this case without the reintroduction of same.

Petitioners state that the plaintiff, Cora Welch, is forty years of age and that they are willing that the proportion of recovery herein to which she is entitled shall be determined according to the life tables

generally in use in the state of Kentucky, and particularly table 4 showing the value of a widow's dower to be found at page 1691
16 of the Kentucky Statutes, 1903 ed., from which it appears that upon a six per cent basis of calculation the said Cora Welch is entitled to 22.61 per cent of whatever may be herein recovered.

Wherefore the premises considered, petitioners pray that they be made parties plaintiff in this action and that they recover judgment jointly with the plaintiffs, Cora Welch, against the defendant the sums prayed for in the original petition and its amendments; and they pray that the order of submission heretofore entered herein be set aside and that this case be at once resubmitted to the court for a judgment upon the evidence heard by the court upon the former trial; that the recovery herein be divided between the plaintiff, Cora Welch, and these petitioners in the proportion of 22.61 per cent t[illegible]e said Cora Welch and the remainder to the four infant petitioners; and they pray for their costs and for all proper relief.

JOUETT, BYRD & JOUETT,
For Petitioners.

Plaintiff, M. T. McEldowney, says that the statements of the foregoing petition are true as he believes.

M. T. MCELDOWNEY.

Sworn to before me by M. T. McEldowney this Nov. 13, 1907.
C. C. PAGE, *N. P. C. C.*

The Exhibit No. 1 mentioned in the foregoing petition was and is in words and figures as follows:

17 STATE OF KENTUCKY,
Clark County Court.

October term, 1907.

Jesse Wilson, Gordon Wilson, and Ella Wilson Brown, minors, over the age of fourteen years, orphans of John F. Wilson, deceased, came into court and with the approbation of the court made choice of M. T. McEldowney for their guardian, who took the oath prescribed by law, and together with W. H. Strossman, security, entered into and acknowledged bond to the Commonwealth of Kentucky, conditioned according to law, which was approved by the court.

A copy attest:
[SEAL.]
J. A. BOONE,
Clerk, Clark County Court.

NOVEMBER 13, 1907.

STATE OF KENTUCKY,
Clark County Court.

On motion of Cora Welch, it is ordered that M. T. McEldowney be, and he is hereby, appointed guardian of Nettie Wilson, minor, under the age of fourteen years, child of John F. Wilson, deceased, whereupon he appeared in court and took the oath prescribed by law, and together with W. H. Strossman, surety, who accepted and

approved by the court, entered into and acknowledged bond to the Commonwealth of Kentucky as guardian aforesaid conditioned according to law.

A copy attest:

J. A. Boone, *C. C. C. C.*

18 Whereas in an action pending in the Clark Circuit Court of Cora Welch and others on petition, a judgment was entered on May 29, 1903, recorded in Order Book 29, page 369, directing a division into two equal portions of a certain tract of land described in the petition, which was owned jointly by W. B. Kidd who owned one-half, and Cora Welch, Jesse Wilson, Ella Wilson, Gordon Wilson, and Nettie Wilson, and whereas D. B. Hampton, Thos. F. Lisle, and E. C. Fox, the commissioners duly appointed by said judgment, have heretofore, to wit, on the day of June, 1903, duly filed their report of said division, allotting lot No. 1, upon the map filed with their report to W. B. Kidd, and lot No. 2, to Cora Welch, Jesse Wilson, Ella Wilson, Gordon Wilson, and Nettie Wilson, said tract No. 1 going to W. B. Kidd in fee simple, and said tract No. 2 going one-third to said Cora Welch for life as widow of John F. Wilson, deceased, and the remaining interest therein going to her children, Jesse Wilson, Ella Wilson, Gordon Wilson, and Nettie Wilson, as children and heirs at law of said John F. Wilson, deceased, and whereas said report has by proper order of this court been duly approved and confirmed and the undersigned, master commissioner of the Clark Circuit Court was by order of said court entered on the day of June, 1903, ordered and directed to execute deeds of conveyance to the respective owners:

Now in obedience to said order, I, Leland Hathaway, master commissioner of the Clark Circuit Court, do hereby convey to Cora Welch an undivided one-third undivided interest as dower tenant for and during her natural life, and the remaining two-thirds in fee simple and the remainder interest in said one-third dower
19 interest to Jesse Wilson, Ella Wilson, Gordon Wilson, and Nettie Wilson, equally and jointly all the right, title, and interest of the said W. B. Kidd and Sallie B. Kidd, his wife, in and to the following-described real estate situated on the north bank of the Kentucky River in Clark County, Ky., and bounded as follows:

Beginning near the mouth of Four Mile Creek, running thence up Kentucky River with the several meanders of low water mark, S. 10–3/4 W. 6.44 poles, S. 15–1/2 E. 26 poles, S. 17–1/2 E. 8 poles, S. 21 E. 19.18 poles, S. 16–1/4 E. 15.12 S. 18–1/2 E. 29.38 poles, S. 34–1/2 E. 27.44 poles; S. 44–1/2 E. 16.12 poles, S. 57–1/2 E. 22.44 poles, S. 62–1/2 E. 21.5 poles, S. 71 E. 25.5 poles to a stone at the south end of the division line; thence with said division line N. 16–1/2 E. 52.8 poles to a stone corner to G. W. Sewell; thence with his line N. 9–1/2 W. 12.92 poles to a point in the center of said creek; thence down said creek N. 88–1/2 W. 120 poles; thence S. 88 W. 25.84 poles; thence S. 4–1/2 E. 20 poles; thence N. 43 W. 13.65 poles; thence

N. 34–1/2 W. 16.48 to the beginning, containing one hundred and fifteen acres, one rood and fifteen poles.

To have and to hold the same to said Cora Welch, Jesse Wilson, Ella Wilson, Gordon Wilson, and Nettie Wilson, in the respective manner and proportions above set out. It is understood that there is a pass way across the southern portion of the above-described tract for the benefit of the present and future owners of tract No. 1, said pass way to follow the present line of the local farm roadway, extending from tract No. 1, through the bottom; thence through barn lot and thence through bottom westward to main neighborhood road.

20 And it is further understood that the grantee herein and all future owners of the hereinbefore described tract are in like manner to have a passway across the northern portion of tract No. 1, being the same roadway which enters the property of the Bush heirs at the present gate, from which point it extends westward along the present marked road way to tract No. 2.

In testimony whereof witness my hand this 1st day of July, 1903.

LELAND HATHAWAY,
Master Commissioner, Clark C. C.

Examined and approved July 1st, 1903.

J. M. BENTON, *Judge.*

STATE OF KENTUCKY,
Clark Circuit Court.

Special term, July 1st, 1903.

I, W. T. Fox, clerk of the Clark Circuit Court, certify that the foregoing deed from Leeland Hathaway, master commissioner, to Cora Welch, &c., was on the 1st day of July, 1903, produced in open court, examined and approved by the court and said commissioner acknowledged the same to be his act and deed. Wherefore, the same was ordered to be, and it is hereby, certified to the proper office for record.

Witness my hand as clerk aforesaid this 1st day of July, 1903.

W. T. FOX, *Clerk.*

21 STATE OF KENTUCKY,
County of Clark, sct.

I, P. E. Bruce, clerk of the Clark County Court, certify that the foregoing deed was on the 2nd day of July, 1903, produced to me in said county certified as above and lodged for record. Whereupon, the same and this and the foregoing certificate have been recorded in my office.

Given under my hand this 8th day of July, 1903.

P. E. BRUCE, *Clerk.*
By W. S. BRUCE, *D. C.*

A copy attest.

STATE OF KENTUCKY,
County of Clark.

I, J. A. Boone, clerk of the Clark County Court, do certify that this is a true and correct copy of the deed of W. B. Kidd by comr. to Cora Welch, &c., as is found in my office in D. B. 12, page 14.

Witness my hand this 14th Nov., 1907.

J. A. BOONE, *Clerk.*
By S. W. POWELL, *D. C.*

And on the same day, to wit, on November 14, 1907, an amended petition was filed herein, same being in words and figures as follows, viz:

22 United States Circuit Court Eastern District of Kentucky.

CORA WELCH, ETC., PLAINTIFFS, *vs.* UNITED STATES OF AMERICA, DEFENDANT.	Amended petition.

The plaintiffs for amendment to their petition herein state that through mistake and inadvertence it was alleged in their original petition herein that the plaintiff, Cora Welch, was the owner of the tract of land described in said petition for injuries to which this suit was brought. They say that the said Cora Welch was in possession of said place, occupying it as a home for the family, and was ignorant of the fact that it was important and necessary to set out all of the owners of the land in this suit. On the contrary she supposed the suit could be carried on in her name and that she could make proper adjustment with her children who are interested with her in the ownership of said land. She now desires to and does withdraw the allegations of her original petition as to the ownership, and in lieu thereof now states that said land is, and was at the time this suit was filed, owned by her and her four children, to wit: Jesse Wilson, Ella Wilson Brown, Gordon Wilson, and Nettie Wilson, she owning an undivided one-third interest therein for her life and said four children jointly owning the remainder interest in said one-third and a fee simple interest in the other two-thirds thereof.

23 Plaintiffs say that they have examined the petition of said children seeking to be made parties to this action and asserting their proportionate interests in the recovery, if any, herein, and she hereby consents that said petition may be filed; that the order of submission herein may be set aside; that the case may be again submitted to the court for a judgment upon the proof heretofore presented in this action; and that the judgment herein may be rendered in accordance with the life tables in use in Kentucky, that it, upon the basis of 22.61 per cent thereof going to her and the remainder to her said four children equally, or to such other proportions as to the court seems proper.

Wherefore she prays as in her original petition, save that the recovery be for the benefit of herself and her children as above set

out; and she unites in the prayer of the petition of her said children herein; and she prays for all proper relief.

JOUETT, BYRD & JOUETT,
For Plaintiffs.

Plaintiff, Cora Welch, says that the statements of the foregoing amended petition are true as she believes.

CORA WELCH.

STATE OF KENTUCKY,
County of Clark, sct.

I, C. C. Page, notary public in and for the foregoing county and State, certify that the foregoing answer was this day subscribed and sworn to before me by Cora Welch.

My commission expires Oct. 8, 1908.

C. C. PAGE,
Notary Public, Clark Co., Ky.

24 And on the same day, to wit, on November 14th, A. D. 1907, a final judgment was filed herein, same being in words and figures as follows, viz:

United States Circuit Court, Eastern District of Kentucky.

CORA WELCH, ETC., PLAINTIFFS,
vs.
UNITED STATES OF AMERICA, DEFENDANT. } Final judgment.

This cause having been submitted to the court upon the pleadings and the evidence heretofore presented and upon agreement of counsel, and this court being advised, herewith files its written opinion, and in accordance therewith it is ordered and adjudged that the plantiff, Cora Welch, *Hesse* Wilson, Ella Wilson Brown, Gordon Wilson, and Nettie Wilson, recover of the defendant, the United States of America, the sum of two thousand dollars ($2,000.00) with interest from November 14th, 1907, at 4 per cent per annum, in the following proportions, to wit: Cora Welch, four hundred and fifty-two and 24/100 dollars; Jesse Wilson, three hundred and eighteen and 95/100 dollars; Ella Wilson Brown, three hundred and eighty-six and 95/100 dollars; and Nettie Wilson, three hundred and eighty-six and 95/100 dollars, and that they recover of defendant their costs herein expended.

25 And on a day following, to wit, on January 11th, A. D. 1908, motion and grounds for new trial were filed herein, same being in words and figures as follows, viz:

United States Circuit Court, Eastern District of Kentucky.

CORA WELCH ET AL., PLAINTIFF,
vs.
THE UNITED STATES, DEFENDANT. } Motion and grounds for new trial.

Now comes the district attorney for the United States at the suggestion of the Attorney-General and moves the court to set aside

the judgment rendered herein in the above-styled case, award a new trial for the following reasons, to wit:

1st. Because the court erred in allowing plaintiff the sum of $1,700 for destruction of plaintiff's right of way as alleged.

2nd. Also moves the court to set aside so much of said judgment as awards $1,700 damages for right of way.

Respectfully submitted.

J. H. TINSLEY, *U. S. Atty.*

Cited: Transportation Co. *vs.* Chicago, 99 U. S., 635; Gibson *vs.* United States, 166 U. S., 269; Bedford *vs.* United States, 192 U. S., 217; Mills et al. *vs.* United States, 46 Fed., 738; Cooley's Constitutional Law, sec. 781–784.

26 And on a day following, to wit, February 17, 1908, a motion to make findings more specific, was filed herein, same being in words and figures as follows, viz:

United States Circuit Court, Eastern District of Kentucky.

CORA WELCH, PLAINTIFF, *vs.* THE UNITED STATES, DEFENDANT.	Motion to make findings more specific.

Now comes the United States, by J. H. Tinsley, U. S. attorney, and moves the court to make its findings of fact more specific as to destruction of right of way, for which $1,700.00 is allowed.

J. H. TINSLEY, *U. S. Attorney.*

And on a day following, to wit, on February 17th, A. D. 1908, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

This day came J. H. Tinsley, U. S. attorney, and filed motion that the court make more specific its findings of fact herein.

27 And on a day following, to wit, on February 19th, A. D. 1908, additional finding of fact was filed herein, same being in words and figures as follows, viz:

United States Circuit Court, Eastern District of Kentucky.

CORA WELCH, ETC., PLAINTIFF,
vs.
THE UNITED STATES, DEFENDANT.

The attorney for the United States having moved the court to make more specific its finding of fact therein, as to destruction of plaintiff's right of way and the court having considered said motion,

sustained same and now finds as follows, in support of its former conclusions of law thereof.

Plaintiff owned a farm situated on Four Mile Creek, including its mouth near Ford, Ky., which creek empties into the Kentucky River a short distance above the dam at Lock No. 10. The farm lies on the south side of said creek. The county road leading to Ford, Ky., is on the north side of said creek. The only practical outlet for plaintiff, from their farm to the county road, was a private roadway, running across the upper end of their bottom for about fifty yards, then over the lands of Lizzie Sewell for about three hundred yards. Plaintiff had a right of way over the Sewell land, which lies on the opposite side of the creek from plaintiff's land, and adjoins the county road. This private roadway was a good way to get out. This roadway by reason of a pool caused by the dam stands about twelve
28 to fourteen feet under water all the time. The lands further up the stream are owned by other parties, and plaintiffs have no right of way over them. In order for plaintiffs to reach the county road, since this private roadway was submerged, they would have to go around on a ridge about two miles out of their way. The bluff they would have to go up, in order to get on this ridge, is very steep, and it is not practical to make a road that way. The destruction of this private roadway, lessens the value of plaintiff's farm at least $1,700.00. It was only about three hundred yards from plaintiffs' farm to the county road the way they had the right to go. The town of Ford is about three miles distant from their farm, and is the nearest post-office, the nearest place to which they haul their crops.

A. M. J. COCHRAN, *Judge.*

Febry. 19, 1908.

And on the same day, to wit, on February 19th, A. D. 1908, an order was made and entered herein, the same being in words and figures as follows, viz:

Order.

This day the motion of the United States attorney requesting the court to make more specific its findings of fact herein was sustained, and an addition of findings of facts filed.

And on a day following, to wit, on April 7th, A. D. 1908, a petition for writ of error was filed herein, same being in words and figures as follows, viz:

29 In the Circuit Court of the United States in the Eastern Dist. of Kentucky, Nov. term, 1908, held at Richmond, Ky.

CORA WELCH ET AL., PLAINTIFF, *vs.* THE UNITED STATES OF AMERICA, defendant.	Petition for writ of error.

And now comes the defendant, the United States of America, by J. H. Tinsley, U. S. attorney, and says that on and about the 7th day

of Nov., 1907, this court entered judgment herein in favor of the plaintiffs and against the defendant, in which the judgment and proceedings had prior thereto, in this case, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, the defendant prays that writ of error may issue in this behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said court, and as in duty bound will ever pray.

J. H. TINSLEY, *U. S. Attorney.*

Writ of error allowed:

A. M. J. COCHRAN, *Dist. Judge.*

Copy handed me this 7th day of April, 1908.

E. S. JOUETT, *Atty. for Plaintiff.*

30 And on the same day, to wit, on April 7th A. D. 1908, assignment of errors was filed herein, same being in words and figures as follows, viz:

In the Circuit Court of the United States in the Eastern District of Ky., held at Richmond, Ky., at Nov. term 1907.

CORA WELCH ET AL., PLAINTIFF,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT. } Assignment of error.

The defendant by its attorney in this action in common with its petition for writ of error, makes the following assignment of errors which it avers, occurred at the trial.

1st. The court erred in failing to sustain defendants demurrer general and special to the petition.

2nd. The court erred in failing to sustain defendant's motion to strike out the part of the petition claiming damages for loss of road.

3rd. The court erred in allowing plaintiff $1,700.00 damages for right of way as alleged.

4th. The court erred in adjudging plaintiff $1,700.00 in damages for right of way.

5th. The court erred in overruling defendant's motion to set aside so much of the judgment as allows plaintiff $1,700.00 for damages to right of way.

31 6th. The court erred in failing to hold that the damages to loss of road resulting from the erection of lock on Kentucky River, a navigable highway for the public good, was not the result of taking of plaintiff property, and was merely incidental to the exercise of a servitude to which the property had always been subject.

J. H. TINSLEY,
U. S. Attorney.

Service of a copy of within assignment of error acknowledged by me this 7th day of April, 1908.

E. S. JOUETT,
Attorney for Plaintiff.

And on the same day, to wit, on April 7th, A. D. 1908, an order was made and entered herein, same being in words and figures as follows, viz:

Order.

This 7th day of April, A. D. 1908, came the defendant the United States of America by James H. Tinsley, United States attorney, and filed herein and presented to the court his petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by him; praying also that a transcript of the record and proceedings and papers, duly authenticated may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow a writ of error as prayed for by said defendant.

32 And on a day following, to wit, on April 7th, A. D. 1908, a writ of error was filed herein, same being in words and figures as follows, viz:

33 In the Circuit Court of the U. S.

CORA WELSH ET AL.
vs.
THE UNITED STATES OF AMERICA. } Writ of error.

The President of the United States to the honorable the judges of the Circuit Court of the United States for the Eastern District of Kentucky, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which in the said Circuit Court before you, or some of you, between Cora Wells et al., plaintiff, and the United States, defendant, a manifest error has happened, to the great damage of the said United States, defendant, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 6th day of May next in the said Supreme Court of the United States to be then and there held that, the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done

therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of our
34 Supreme Court, the 7th day of April, in the year A. D. 1908.

Jos. C. FINNELL,
Clerk of the Circuit Court of the U. S. for the East. Dist. of Ky.

Allowed by

A. M. J. COCHRAN,
District & Acting Circuit Judge.

We acknowledge service of the within writ.

E. S. JOUETT,
Atty. for Plaintiff.

35 And on the same day, to wit, on April 7th, A. D. 1908, a citation issued herein, same being in words and figures as follows, viz:

36 *Citation.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States to Cora Welsh and David Welsh (her husband), Jesse Wilson, Ella Wilson Brown, Gordon Wilson, and Nettie Wilson:

You are here cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, District of Columbia, on the 6th day of May next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Sixth Circuit and Eastern District of Kentucky, wherein the United States is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. A. M. J. Cochran, district judge holding the Circuit Court of the United States in said district this 7th day of April, in the year A. D. 1908.

A. M. J. COCHRAN,
Judge.

We acknowledge service of within citation this 7th day of April, 1908.

E. S. JOUETT,
Atty. for Plff.

37 And on the same day, to wit, on April 7th, A. D. 1908, Hon. James H. Tinsley, United States attorney, filed a præcipe herein, same being in words and figures as follows, viz:

United States Circuit Court, Eastern District of Kentucky.

CORA WELCH ET AL.
vs.
THE UNITED STATES. } Præcipe for record.

The clerk will copy the entire record in this case for the Supreme Court, including the findings of the court who tried the case, except that he need not copy the evidence used on the trial.

J. H. TINSLEY,
U. S. Attorney.

38 THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss.

I, Jos. C. Finnell, clerk of the Circuit Court of the United States for the Sixth Judicial Circuit and Eastern District of Kentucky, at Richmond, hereby certify that the foregoing thirty-seven pages contain a full, true, and correct transcript of the proceedings and pleadings had in the case set out in the caption hereto, to the extent called for by the præcipe filed by J. H. Tinsley, United States attorney for said Eastern District of Kentucky, as same appears from the files and records of this office.

Witness my hand as clerk and seal of said court, at Richmond, Ky., this 10th day of April, A. D. 1908, and of the Independence of the United States of America the 132d year.

[SEAL.] Jos. C. FINNELL, *Clerk.*

39 (Indorsement on cover:) File No., 21151. E. Kentucky. C. C. U. S. Term No., 376. The United States, plaintiff in error, vs. Cora Welch and David Welch (her husband), Jesse Wilson, Ella Wilson Brown, et al. Filed April 29th, 1908. File No., 21151.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES
v.
CORA WELCH AND DAVID WELCH, HER husband, Jesse Wilson, Ella Wilson Brown, et al. } No. 147.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is here on writ of error to the Circuit Court of the United States for the Eastern District of Kentucky.

Plaintiff in error seeks to reduce a final judgment of $2,000 to $300, upon the ground that $1,700 was awarded for the destruction by the Government of the use of a private road which had afforded convenient access between the farm of defendants in error and the public highway.

The question involved is, whether the Government, in view of the fifth amendment to the Constitution,

is liable to the owners of the farm, which has been lessened in value in consequence of the flooding of a private road by the erection of structures to improve the navigable capacity of a river. It appears that since the erection of the structures the owners of the farm can not use the private road in going to and returning from the nearest public highway, and are obliged to travel 2 miles, instead of 300 yards, as formerly. (Rec., 1, 2, 3, 16.)

On February 21, 1905, two of the defendants in error, Cora Welch, and David Welch, her husband, brought suit against the United States to recover the sum of $2,000 claimed by them as damages to their 115-acre farm, which, as alleged in their petition, was situated in Clark County, Ky., "on the north side of the Kentucky River, at the mouth of and on the east side of Four Mile Creek." (Rec., 1, 2.) The right to recover is based upon the ground that they are damaged, in that their farm is lessened in value by reason of the erection by the Government of a certain lock and dam to improve the navigable capacity of the Kentucky River. It is alleged that by reason of said improvements 3 acres of their farm are submerged and destroyed to their damage in the sum of $300. It is further alleged, in effect, that the value of their farm is lessened in the sum of $1,700 by the erection of said improvements, which deprived them of the use and enjoyment of a public highway, known as the Ford County road, thereby making it necessary to travel much farther to reach the town of Ford, which "is the nearest post-office and the nearest

place to which they haul their crops and go for other business of all kinds." (Rec., 1, 2, 3.)

To that part of the petition in respect to the Ford County road a demurrer general and special was interposed. A motion was also made to strike from the petition all allegations with reference to said road. (Rec., 4, 5.) The record does not show whether the court ruled upon either the demurrer or the motion. By leave of court, defendants in error filed an amendment to their petition in which it is alleged that the value of the 3 acres of land submerged was the sum of $450. (Rec., 6.)

The case was tried April 26, 1907. On November 11 following the court found from the evidence, in effect, that prior to the erection of the dam and lock the farm of defendants in error was worth $4,000. That it had been damaged by the construction of the dam and lock in the sum of $2,000. Upon this finding $300 was allowed for 3 acres of land submerged and $1,700 for the private road destroyed.

Subsequently, by leave of court, other persons were made parties plaintiff, and on November 14, 1907, judgment was rendered against the United States for the sum of $2,000, with interest from that date at 4 per cent per annum. (Rec., 14.) January 11, 1908, counsel for the Government filed motion for a new trial upon the ground that the court had erred in allowing defendants in error the sum of $1,700 for the destruction of the private road. February 17, 1908, a motion was made by counsel for the Government to make more specific the finding of fact upon which

the sum of $1,700 had been awarded. February 19, 1908, this motion was allowed by the court, and a new finding was made and entered of record, as follows:

> Plaintiff owned a farm situated on Four-Mile Creek, including its mouth near Ford, Ky., which creek empties into the Kentucky River a short distance above the dam at Lock No. 10. The farm lies on the south side of said creek. The county road leading to Ford, Ky., is on the north side of said creek. The only practical outlet for plaintiffs, from their farm to the county road, was a private roadway running across the upper end of their bottom for about fifty yards, then over the lands of Lizzie Sewell for about three hundred yards. Plaintiffs had a right of way over the Sewell land, which lies on the opposite side of the creek from plaintiffs' land, and adjoins the county road. This private roadway was a good way to get out. This roadway, by reason of a pool caused by the dam, stands about 12 to 14 feet under water all the time. The lands farther up the stream are owned by other parties, and plaintiffs have no right of way over them. In order for plaintiffs to reach the county road, since this private roadway was submerged, they would have to go around on a ridge about 2 miles out of their way. The bluff they would have to go up in order to get on this ridge, is very steep, and it is not practical to make a road that way. The destruction of this private roadway lessens the value of plaintiffs' farm at least $1,700. It was only about 300 yards from plaintiffs' farm to the county road the way they had the

right to go. The town of Ford is about 3 miles distant from their farm, and is the nearest post-office, the nearest place to which they haul their crops. (Rec., p. 16.)

THE ISSUES AND THE GOVERNMENT'S DEFENSE.

There are six assignments of error; each, however, refers to the rulings of the court in respect to the private road and we think raise but one question, namely: Did the court err in awarding damages to plaintiffs' land by reason of the destruction of said private road?

It may be admitted that where the Government by the erection of a public improvement takes private property there is an implied contract on its part to make compensation therefor.

But if private property is merely lessened in value by the erection of a public improvement and is not invaded or encroached upon, there is no such implied contract. (*Transportation Company* v. *Chicago*, 99 U. S., 635, 642; *United States* v. *Lynah*, 188 U. S., 445, 465; *Mills* v. *The United States*, 46 Fed. Rep., 738, 742, 748.)

To constitute a taking of private property such as is inhibited by the fifth amendment to the Constitution, unless just compensation is made, it must be shown that the owner thereof has been wholly deprived of the use of the same. If it has been merely injured or its use impaired, there is no taking such as is contemplated by said amendment. (*Transportation Company* v. *Chicago*, 99 U. S., 635, 642;

Bedford v. *The United States*, 192 U. S., 217, 223, 224, 225; *Manigault* v. *Springs*, 199 ib., 473, 484, 485; *C., B. & Q. Ry.* v. *Drainage Commissioners*, 200 ib., 561, 583, 584.)

Where ingress and egress to and from private property is rendered more difficult by reason of the erection of a public improvement and the value of the property is thereby lessened, there is not a taking such as is contemplated by said amendment. (*Gibson* v. *The United States*, 166 U. S., 269, 270, 275, 276.)

A claim for damages against the Government which arises out of the construction of a lock and dam to improve the navigable capacity of a river, whereby a private road has been destroyed which afforded to the owners of the farm convenient access to and from a public highway, is not a claim "founded upon the Constitution," even though the destruction of the private road has lessened the value of the farm. (*Scranton* v. *Wheeler*, 179 U. S., 141, 164.)

ARGUMENT.

The destruction of the use of a private roadway over the land of defendants in error and the easement over the land of another, as set forth in the foregoing facts, does not *per se* constitute a taking of private property for public use, for which compensation must be made, as provided in the fifth amendment to the Constitution. The facts as found by the court below bring the question presented by the assignments of error within the principle set forth in *Gib-*

son v. *U. S.* (166 U. S., 269), *Scranton* v. *Wheeler* (179 U. S., 141), and *Manigault* v. *Springs* (199 U. S., 473).

In *Gibson* v. *The United States, supra*, the Government had erected a dike for the purpose of improving the navigable capacity of the Ohio River. Mrs. Gibson owned a farm of 20 acres riparian to the river and having a frontage of 1,000 feet on the main navigable channel, where she had a landing "which was used in shipping the products from, and the supplies to, her said farm." The construction of the dike "substantially destroyed the landing * * * by preventing the free egress and ingress to and from" the same during the greater part of the year when the products of her farm had to be shipped, thereby subjecting her to inconvenience in reaching another landing (not on her farm) and reducing its value in the sum of $3,000. She brought suit in the Court of Claims. That court dismissed her petition. (29 C. Cls., 18, 35.) Upon appeal to this court, the judgment of the Court of Claims was affirmed. In its opinion, this court, among other things, said:

> The fifth amendment to the Constitution of the United States provides that private property shall not "be taken for public use without just compensation." Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a govermental power (275).

In *Scranton* v. *Wheeler, supra,* the vital question involved was—

> Whether the prohibition in the Constitution of the United States of the taking of private property for public use without just compensation has any application to the case of an owner of land bordering on a public navigable river whose access from his land to navigability is permanently lost by reason of the construction of a pier resting on submerged lands away from but in front of his upland, and which pier was erected by the United States not with any intent to impair the rights of riparian owners but for the purpose only of improving the navigation of such river (153).

In respect to the above question the court held that no compensation could be allowed for any loss of access to land resulting from the erection of structures "to improve and which manifestly did improve the navigation of a public navigable water" (165).

In *Manigault* v. *Springs, supra,* a claim for damages was based upon "interruption of access to land" and the impairment of "a right to navigate a creek" (485). In respect to such claim the court said:

> We have repeatedly held that where the Government of the United States has, for the purpose of improving the navigation of a river, erected piers or other structures by which access to plaintiff's land is rendered more difficult, there is no claim for compensation. (*Gibson* v. *The United States,* 166 U. S., 269; *Scranton* v. *Wheeler,* 179 U. S., 141.) (485.)

In *Mills et al.* v. *The United States, supra,* plaintiffs in their petition allege, in effect, that the Government in the erection of structures to improve navigation had destroyed the facilities for draining their rice plantations, thus rendering it necessary for them to construct new drainage works at a cost of $10,000. A demurrer to the petition was sustained by the court upon the ground mainly that the alleged acts of the Government did not constitute a taking of private property for public use, such as is prohibited by the fifth amendment to the Constitution, unless just compensation is made, and that the injury complained of is *damnum absque injuria.*

In *The United States* v. *Lynah, supra,* the Mills case was referred to and commented upon by the court as follows:

> It was an action for injuries to a rice plantation on the banks of the Savannah River resulting from works done by the United States in improving the navigability of that river, apparently the very improvement made by the Government in the present case. The condition of the claimant's rice plantation prior to the improvement was substantially that of these plaintiffs' property, and the lands were drained by opening the gates when the river was at low-water mark. The complaint was that the erection by the Government of what was called the "cross tides dam," running from the upper end of Hutchinson's Island to the lower end of Argyle Island, cut off all the flow of water from the stream connecting the

front and back rivers, raised both the high and low water levels in the front river, and not only destroyed the facilities for draining these lands into the front river, but rendered it necessary to raise the levees around the rice fields, to prevent flooding the fields at high water. This, it was alleged, unfitted the lands for rice culture and made it necessary that new drainage into back river be provided where the water levels were suitable. Obviously, there was no taking of the plaintiff's lands, but simply an injury which could be remedied at an expense as alleged of $10,000, and the action was one to recover the amount of this consequential injury. The court rightfully held that it could not be sustained. (473, 474.)

It is respectfully submitted that the lower court erred in awarding damages to defendants in error in respect to the loss sustained by them on account of the flooding of the private road.

JOHN Q. THOMPSON,
Assistant Attorney-General.

A. C. CAMPBELL, *Attorney.*

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES
v.
CORA WELCH AND DAVID WELCH, HER husband, JESSE WILSON, ELLA WILSON BROWN, et al. } No. 147.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

REPLY BRIEF FOR THE UNITED STATES.

This suit was instituted under the provisions of the act of March 3, 1887 (24 Stat. L., 505), commonly known as the Tucker Act, the second section of which provides:

> That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. * * *

30287—10——1

This case embraces two claims:

1. The permanent flooding, or "taking" in a constitutional sense, of 3 acres of the land of defendants in error; and,

2. The damages sustained by defendants in error because access to the town of Ford was rendered more difficult by reason of the flooding of the said 3 acres of land over which defendants in error were wont to travel in order to reach the county road leading to the town of Ford.

Since the pleadings were filed a new element of damages has been injected into this cause by defendants in error, namely, damages arising from the destruction of a so-called easement over the land of one Lizzie Sewell, which was overflowed at the same time, and from the decision in whose case the Government has sued out a writ of error to this court. (Docket No. 181, O. T., 1909.)

Counsel for defendants in error concede that the private roadway as far north as Four-Mile Creek was located on and embraced within the 3 acres permanently submerged, thereby making its destruction, apart from the land itself, a separate element of damage. They claim that defendants in error possessed a "private deeded passway" over the lands of the said Lizzie Sewell, but there is nothing in the record of this case to indicate a passway so acquired.

No question is now raised concerning the award for the 3 acres permanently overflowed, it being conceded that the judgment with respect to that was correct and in accordance with the decisions of this

court in *Pumpelly* v. *Green Bay Co.* (13 Wall., 166) and *United States* v. *Lynah* (188 U. S., 445). The present contention deals only with the tortious feature of this claim.

The petition alleges that "the effect of this cutting off [of access] of said farm is to render it less valuable and to *damage* it in the sum of at least $1,700," and that defendants in error were deprived of the use and enjoyment of a public highway known as the "Ford County road," thereby making it necessary for them to travel much farther in order to reach the town of Ford, which is the nearest post-office and nearest place to which they haul their crops and where they transact other business. (Rec., pp. 1, 2, and 3.) To this last proposition the Government demurred generally, because the facts therein stated do not authorize a recovery, and specially "because the court has no jurisdiction of the matter thus named." (Rec., p. 4.)

The issues before the court, therefore, are—

1. Whether, instead of being a "taking" of property within the constitutional meaning, the damages complained of are not merely consequential; and

2. Whether the suit is one "sounding in tort" and consequently without the jurisdiction of the trial court.

No liability for consequential damages.

It is well established that no action will lie for damages consequent upon the erection of public improvements in a skillful and prudent manner, although the result of such erection may impair the

value of property by rendering ingress and egress thereto more difficult. Damages also may follow a change in the grade of a street or even the closing thereof; or the erection of a dam to the injury of a canal, or the destruction of the right to fish; it may follow the construction of one turnpike or such like means of travel by the construction of another route, but in all such cases, the courts have uniformly held there has been no taking of property but that the damage complained of is consequential, giving no right of action unless the statute authorizing the work specially renders the municipality or corporation liable. It is one of those cases of individual hardship that must be borne for the public good.

It is axiomatic that private rights are always subservient to the public good.

> Grotius de Jure Belli, Bk. 3, C. 20, S. 7, sec. 1.
> *Surroco* v. *Geary*, 3 Cal., 70.
> 58 Am. Dec., 385.

"Every great public improvement," it was said in *Lansing* v. *Smith* (8 Cow., 146, 149), "must, almost of necessity, more or less affect individual convenience and property; and where the injury sustained is remote and consequential it is *damnum absque injuria*, and is to be borne as a part of the price to be paid for the advantages of the social condition. This is founded upon the principle that the general good is to prevail over partial individual convenience." And in *Stevens* v. *Patterson R. R. Co.* (34 N. J. L., 532–549) the court said:

> Every citizen is required at times to contribute something, by way of sacrifice, to the

public good. Such partial evil is the price which is paid for the advantages incident to the social state. It is not necessary to refer extensively to authorities in confirmation of the doctrine that, as a general rule, the public domain is subject altogether to the control of the legislature, and that incidental damage resulting to individuals from the exercise of such control gives no legal claim to compensation.

Cooley on Constitutional Limitations (6th ed.) lays down the rule with respect to consequential injuries as follows:

> It is a general rule that no one has a vested right to be protected against consequential injuries arising from a proper exercise of rights by others. This rule is peculiarly applicable to injuries resulting from the exercise of public powers. Under the police power the State sometimes destroys, for the time being, and perhaps permanently, the value to the owner of his property, without affording him any redress. The construction of a new way or the discontinuance of an old one may very seriously affect the value of adjacent property; the removal of a county or state capital will often reduce very largely the value of all the real estate of the place from whence it was removed; but in neither case can the parties whose interests would be injuriously affected, enjoin the act or claim compensation from the public (p. 473).

Any proper exercise of the powers of government which does not directly encroach upon

the property of an individual or disturb him in his possession or enjoyment will not entitle him to compensation or give him a right of action. If, for instance, the State, under its power to provide and regulate the public highways, should authorize the construction of a bridge across a navigable river, it is quite possible that all proprietary interests in land upon the river might be injuriously affected, but such injury could no more give a valid claim against the State for damages than could any change in the general laws of the State which, while keeping in view the general good, might injuriously affect particular interests. So if, by the erection of a dam in order to improve navigation, the owner of a fishery finds it diminished in value, or if, by deepening the channel of a river to improve the navigation, a spring is destroyed, or, by a change in the grade of a city street, the value of adjacent lots is diminished—in these and similar cases the law affords no redress for the injury. So if, in consequence of the construction of a public work, an injury occurs, but the work was constructed on proper plan and without negligence and the injury is caused by accidental and extraordinary circumstances, the injured party can not demand compensation,

This principle is peculiarly applicable to those cases where property is appropriated under the right of eminent domain. It must frequently occur that a party will find his rights seriously affected, though no property to which he has lawful claim is actually appropriated. As, where a road is laid out along the line of a

man's land without taking any portion of it, in consequence of which he is compelled to keep up the whole of what before was a partition fence, one-half of which his neighbor was required to support. No property being taken in this case, the party has no relief unless the statute shall give it. The loss is *damnum absque injuria*.

* * * * *

So, where a railroad company, in constructing their road in a proper manner on their own land, raised a high embankment near to and in front of the plaintiff's house, so as to prevent his passing to and from the same with the same convenience as before, this consequential injury was held to give no claim to compensation (pp. 666, 669).

Dillon on Municipal Corporations, section 987, says:

The rule is well settled, and has * * * very extensive application to the acts of municipal corporations, viz, that such a corporation, when it confines itself *within the limits of its power and jurisdiction, is not liable to an action for consequential damages* to private property or persons (unless it be given by special constitutional provision or by statute) where the act complained of was done by it or its officers *under and pursuant to authority conferred by a valid act of the legislature* and there has been no want of reasonable care or want of reasonable skill in the execution of the power, although the same act, if done without legislative sanction, would be actionable.

Sedgwick on Statutory and Constitutional Construction, second edition, cites numerous cases of indirect and consequential injury which are not deemed to be a taking within the meaning of the Constitution. He says (pp. 456 et seq.):

> It seems to be settled that, to entitle the owner to protection under this clause [the right to take under the power of eminent domain], the property must be actually taken in the physical sense of the word, and that the proprietor is not entitled to claim remuneration for indirect or consequential damage, no matter how serious or how clearly and unquestionably resulting from the exercise of the power of eminent domain.

In Mr. Pomeroy's notes on the principle above announced, he observes:

> Under certain circumstances by the exercise of the police powers of the Government, private property may be seized, confiscated, destroyed, interfered with, regulated or injured, and these acts will not constitute a taking for public use within the meaning of the Constitution. Such governmental acts are not done by virtue of the power of eminent domain.

In *Harvard College* v. *Stearns* (15 Gray, 1) it appears that damages were sought, among other things, on account of the lessening or reduction in the value of land resulting from an obstruction placed in a navigable stream or public highway, thereby rendering the land more difficult of access. The court held that no action would lie for such injuries.

In *Louisville & Frankfort R. R.* v. *Brown* (17 B. Mon., 763) it appears that the railroad company, under proper authority, constructed along the center of the street in front of plaintiffs' lot a wall 12 feet in width and 4 feet high, at the western end of the lot; that the erection of the wall had greatly injured their lot and building and impaired their value; that it had deprived them of the use of a greater portion of the street and greatly interfered with the use and enjoyment of the remainder; that the wall had entirely obstructed the crossing of said street in front of their lot and hindered the plaintiffs in their lawful use of the same. After citing numerous authorities to the effect that no action would lie for such injury, the court said:

> The current of authority upon this point, swelling with the accessions to which the introduction of the railroad system upon an extended scale has given rise in the courts of almost all the States, is unbroken. · It may be assumed as true that some portion of every railroad in the Union runs through the street of a city, town, or village, and in all the litigation which has resulted we have met with no case recognizing a different doctrine, except where the general principle has been modified by some statutory enactment. Reason and justice, no less than judicial authority, sanction the principle. No right of property is invaded; no property of the appellees has been taken for public use without compensation. Their right to the use of the street, even according to the

> most comprehensive definition of that right, is held and must be exercised in subjection to the equally well established right of the municipal power of the town or city to make such appropriation of the streets as, in their opinion, will best promote the interests and business of the local community (pp. 777, 778).

With reference to the vacating or closing a street so as to cut off access to property in one direction, Lewis in his work on Eminent Domain (3d ed., sec. 202) says:

> Whether one may recover compensation when the street in front of his property is closed or vacated between his property and the next connecting street on one side, so as to cut off access in that direction, while leaving access in front and in the other direction unimpaired, is one of the vexed questions of the law. A leading case on the question is that of *Smith* v. *Boston* (7 Cush., 254), decided by the Supreme Court of Massachusetts. The street on which the plaintiff abutted was vacated near to but not in front of his property. He had access in the other direction. The case was a petition for damages under the statute, which was as follows: "If damage shall be sustained by any persons in their property, by the laying out, altering, or discontinuing any highway, the commissioners shall estimate the amount of damage sustained by such persons, and in their return shall state the share of each separately." "In estimating the damages sustained by any person in his property, by the laying out, altering or discontinuing of

any highway, the jury shall take into consideration *all the damage done to the complainant, whether by taking his property, or by injuring it in any manner*, and they shall also allow, by way of set-off, the benefit, if any, to the property of the complainant, by reason of such laying out, alteration, or discontinuance." The language of the statute could hardly be more comprehensive, but the court held that the plaintiff did not sustain damage within the meaning of the statute, though his property was depreciated in value by the discontinuance of the street. * * * This case has been approved and followed in many subsequent cases in the same court involving similar facts and has exerted a marked influence upon the law of the country. It is now the settled doctrine in Massachusetts that property is not damaged within the statute by the vacation of a street or highway unless it abuts upon the part of the street vacated or is cut off altogether from the general system of highways. The doctrine is admitted to be harsh in some cases, but is adhered to as affording a definite and practical rule and on the ground of *stare decisis* and the acquiescence of the legislature. Many other courts follow the Massachusetts doctrine and hold that when access to property is cut off in one direction by the vacation or closing of the street upon which it abuts, but may be had in the other direction, the property is not taken or damaged within the meaning of constitutions or statutes giving compensation. * * *

This rule is peculiarly applicable to the case at bar, for, as we shall hereafter see, access to the farm of defendants in error is merely rendered more inconvenient and expensive, but not cut off altogether.

In *Shrunk* v. *Schuylkill Nav. Co.* (14 S. & R., 71) the plaintiff, an owner of land fronting the Schuylkill River above tide water, had the exclusive right of drawing seines on his own land. Suit was brought to recover damages sustained in consequence of the erection of a dam across the river by defendant company, on account of which fish were prevented from passing up the river. The question presented was whether plaintiff, under the law of the State providing compensation for persons injured "in consequence of the erection of any dam or dams," has such a property right in a fishery as is susceptible of injury. The court said:

> Compensation shall be made for all damage arising from immediate injury to property, but not for any damage where there is no legal injury, which is called *damnum sine injuria*. And, upon reflection, we shall find that this was a wise restriction. There would be no end to damages for *injuries* considered in the most extensive sense of the word. For not only may the owners of land contiguous to the river complain of injury by the obstruction to the ascent of fish but also all other persons living in towns or lands *near* the river. All these persons feel the loss of fish. They either can not get them at all or must pay a higher price for them. All persons accustomed to fish with

an angle or a hoop net may truly say they are injured. There are other kinds of injury, too, sustained, particularly by the owners of lands on the river between the *Fairmount* dam and the *Lower Falls*. All these persons have lost the benefit of navigation free from toll, in batteaus, flats, etc., which was very useful, as it served for carrying produce to market and bringing up manure for their lands. Yet it has not been contended that for such injuries compensation is to be made. Suppose the health of the country to be injured by the evaporation from the dams. Is compensation to be made for this, the greatest of all injuries? I presume not. Where, then, are we to stop, or what is to be the boundary, if we go beyond the line which I have mentioned? I confess I should be at a loss to fix any other. The plaintiff retains the complete ownership of his land and the exclusive right of using it for the purpose of a fishery. There will still be fish, which remain all the year in the river, though the ascent of those from the sea is stopped. The value of his land is lessened, and that is his misfortune. But it is lessened by an accidental circumstance (pp. 83, 84).

Keasy v. *City of Louisville* (4 Dana, 154) was an action on the case to recover damages. It appears that plaintiff owned a lot in Jefferson street in the city of Louisville upon which he had erected a small house. Thereafter the city elevated the grade of the street about 3 feet, in consequence of which plaintiff was required to fill up his lot, reconstruct

his house, and in other respects was subject to inconvenience and damage. The court, among other things, said:

> If the city possess the power to shut up Jefferson street, and should exercise it, the reclusion would subject the plaintiff and others also to much more inconvenience and actual loss than any which could have been occasioned by the elevation of the grade; but, the power conceded, a legal right to damages for the total obliteration of the street could not be maintained. It would be *damnum absque injuria*, loss, not injury—inconvenience, not wrong—to which every citizen must submit, and to something like which every citizen does submit, for the public good.

See, to same effect, *Wolfe* v. *C. & L. R. R.*, 15 B. Mon. (Ky.), 404.

Hollister v. *The Union Company* (9 Conn., 436) is directly in line with the principle contended for. In that case it appeared that a corporation was created by the Connecticut legislature for the purpose of removing obstructions to navigation in the Connecticut River. With an honest intention to accomplish this object and without any design to injure any proprietor of land, the corporation erected piers and put other obstructions in the river whereby plaintiff's land was gradually undermined and washed away. Plaintiff brought an action on the case agains the corporation for the injury thus sustained. The court held that the damages were consequential and there was no taking of private property for public

use within the constitutional interdiction. In the course of a well-considered opinion the court said:

> The plaintiff in the county court, now defendant, endeavors to place himself on this ground: that if there can not be a recovery in this case for the injury, then a fundamental principle of the common law and of the constitution of this State and of the *United States* is subverted. The doctrine on which he relies is this: "The property of no person shall be taken for public use without just compensation therefor." This is, indeed, a fundamental principle of constitutional law. I feel no inclination to impugn it or in any degree to affect it. The act in question, under which the defendants have operated from their incorporation, expressly recognizes this principle. It provides, in terms, that all lands *taken* for the purpose of erecting wharves shall be paid for according to an assessment of the county court. But the principle now assumed is much broader. The charge of the county court to the jury was that the defendants were liable for any injury to the land of the plaintiff occasioned by the diversion of the water from its natural course by the erection of their works. By this charge the jury were to lay out of their consideration all acts of the defendants designed to injure the plaintiff's land—all imprudent and improper acts in the construction of their works—and solely to inquire if the works caused the injury complained of. Such a doctrine can not be sustained.

* * * * *

The public, being the owners of this river, have an unquestionable right to improve the navigation of it without any liability for remote and consequential damages to individuals. (*Lansing* v. *Smith et al.*, 8 Cowen, 146.) This is a very recent decision of the Supreme Court of the State of New York. The marginal note of the case is as follows: "The statute (of New York) authorizing the construction of a basin in the Hudson River, in the city of Albany, and erections whereby the docks, etc., owned by individuals alone, were rendered inaccessible or less easily approached by vessels, etc., and therefore much depreciated in value, though it provided no compensation for such a consequence, is not unconstitutional, either as taking private property for public use, without just compensation, or impairing the obligation of contracts. This not being a direct invasion of property, but remote and consequential merely, arising from a public improvement, the injury is one to which individuals must submit, as the price of the social compact; and in the eye of the law the injury is '*damnum absque injuria*.' The injury being common to a large class of the community it is the subject of indictment only as a common nuisance."

The case was much stronger for the plaintiff than the present. There, by the erections of the defendant in the river the docks, etc., owned by the plaintiff were much depreciated in value. The principles and reasoning of that learned court are so very apposite to the case under consideration that they very readily

meet my assent. The court say: "If the act be unconstitutional it must be on the ground that the plaintiff had either at common law, as owner of the adjacent soil, or by virtue of the patent from the State, for the land under water opposite to the shore, a claim to the natural flow of the river, with which the State had no right to interfere, by any erection in the bed of the river, or in any other manner. This proposition appears to the court too extravagant to be seriously maintained. It denies to the State the power of improving the navigation of the river, by dams or any other erections, which must affect the natural flow of the stream, without the consent of the proprietors of the adjacent shore, within the remotest limits which may be affected by the operation. Every new dock which is erected partially diverts the natural course of the stream; and upon the principle contended for by the plaintiff, violates the rights of the proprietors of all the docks below it" (p. 148). It would be extremely difficult to see to what extent the doctrine of the plaintiff would not lead. It would certainly lead to this extent, that if any proprietor of land below or above these erections of the defendants could prove any damages to his possessions, by any diversion of the water from the natural stream, by their operations, he could recover. Such a doctrine I can not admit.

There is also another case quite in point. I refer to *The Governor and Company of the British Cast Plate Manufacturers* v. *Meredith et al.*, 4 Term Rep., 794. It was there decided "that

where the acts of commissioners appointed by a paving act occasion a damage to an individual, without any excess of jurisdiction on their part, the commissioners, or paviors acting under them, are not liable to an action." Lord Kenyon, in that case, thus expresses himself: "If this action could be maintained, every turnpike act, paving act, and navigation act, would give rise to an infinity of actions. If the legislature think it necessary, as they do in many cases, they enable the commissioners to award satisfaction to the individuals who happen to suffer; but if there be no such power, the parties are without remedy, provided the commissioners do not exceed their jurisdiction." "Some individuals suffer an inconvenience under all these acts of Parliament; but the interest of individuals must give way to the accommodation of the public." These decisions and opinions are very satisfactory reasons to show that the plaintiff can not recover.

Again, the doctrine of the plaintiff, in my judgment, would lead to this result, that when any person sustains any damage, however remote or consequential, by any turnpike road, improvement of the navigation of a river, any new avenue or street into a large commercial place, or any other alteration of the existing state of things, an action will lie against those who are authorized by the legislature to accomplish such object, if they act within the scope of their powers, and with entire honesty and sound discretion. Such a principle is alike opposed to common sense, common law, and adjudged cases. I can not assent to it.

> The defendants have not directly invaded the property of the plaintiff. They have not *taken* the property of the plaintiff for public use without just compensation; they have not, therefore, brought themselves under the constitutional interdiction; but they have, under the sanction of the authority of the legislature, to which appertained the power of regulating a public navigable river, operated upon this river so as to produce an inconvenience—a remote and consequential injury, to the plaintiff's land. For such an injury no action can be sustained (pp. 443–446).

The case of *Sharp* v. *The United States* (191 U. S., 341) grew out of a proceeding to condemn certain lands in the State of New Jersey upon which were to be erected fortifications and other works of defense. The question arose as to the liability for damages sustained to contiguous land. Mr. Justice Peckham, in delivering the opinion of the court, quoted with approval from *Currie* v. *Waverly, etc., Railroad Co.* (23 Vroom., 392), that—

> It is an established rule in law, in proceedings for condemnation of land, that the just compensation which the landowner is entitled to receive for his lands and damages thereto must be limited to the tract a portion of which is actually taken. The propriety of this rule is quite apparent. It is solely by virtue of his ownership of the tract invaded that the owner is entitled to incidental damages. His ownership of other lands is without legal significance.

Continuing, the learned justice said:

> If A own a single house in a block in a city and the Government proposes to take it, is it liable to the owner of the house adjoining for a depreciation in its value by reason of the taking of the house of A for the purposes proposed? In other words, would the Government be liable to the owner of land not taken for damages which were incidental because of the use intended by the Government of the property it took? In such case no property of the owner of the other land is taken, and although very great damage might be inflicted upon him by the use of the property taken, has he a constitutional right of recompense? It would be within the discretion of Congress to provide that this damage should be paid to the owner of the land not taken, yet still in proceedings to condemn a property for public use on payment of "just compensation," under the Constitution we can not think (in the absence of congressional action to that effect) that the Government would be liable for consequential damages sustained by a party no portion of whose property was taken. Although the present is not exactly such a case, yet the illus tration serves to somewhat bring out the principle under review.
>
> If, again, the Government seek to take the property of A, consisting of a single house in a city, and he has also acquired through a separate title and at a different time houses adjoining, would the Government be liable to A for the damage sustained by that other property on account of the use the Government proposes

to make of the property taken? Or, again, if A purchase a block of vacant lots in a city from one source and at one time and erect a row of buildings thereon and one building the Government seeks to take, would the Government be liable for the damages sustained by the other houses by reason of the uses to which it would put the building taken? These are questions involving different facts which may possibly show the various difficulties inhering in the subject under some circumstances. See *Lincoln* v. *Commonwealth* (164 Massachusetts, 368) and *Wellington* v. *Boston and Maine Railroad* (164 Massachusetts, 380); but in the case before us those difficulties do not, in our judgment, exist. There are here separate and distinct farms conducted under the circumstances detailed, and we can not see that the owner of those separate farms not taken established any right of payment for damages to them arising from the use which the Government intended to make of the land it took (pp. 355–356).

Judge, now Mr. Justice, Lurton, in delivering the opinion of the Circuit Court of Appeals in *High Bridge Lumber Co.* v. *The United States* (69 Fed., 320, 324–26), among other things, said:

> The Kentucky River is a navigable stream, accessible from States other than that in which it lies, and, therefore, within the constitutional powers of Congress over the navigable waters of the United States. Congress may rightfully open and keep open such a river for the public benefit, and may make such improvements as its discretion may dictate for the purpose of

maintaining its safe and profitable navigation. (*Gilman* v. *Philadelphia*, 3 Wall., 721–725; *Scranton* v. *Wheeler*, 16 U. S. App., 152, 6 C. C. A., 585, 57 Fed., 803.) The power to lock and dam such a stream in the interest of navigation is unquestioned. Now, if it be assumed that the gate of this structure shall be so placed as that the direction of the current of the stream will be changed in a way which shall impair the usefulness of the lands of the plaintiff in error above the dam, and that, as a further consequence of the presence of the dam in the river, the level of the water above it shall be so raised as to overflow the lands of riparian owners, including plaintiff in error, may such consequential damages to plaintiff in error be considered in estimating the value of the parcel now condemned? The well-settled rule in respect of consequential injuries resulting from the prudent and skillful construction of public works by the Government or the State, or those acting under legislative authority, is that for such damages no action will lie unless expressly conferred by statute. (Cooley, Const. Lim., side, pp. 541–543; *Transportation Co.* v. *Chicago*, 99 U. S., 635–641; *Railroad Co.* v. *Bingham*, 87 Tenn., 522, 11 S. W., 705; *Smith* v. *Washington*, 20 How., 135.)

* * * * *

It is not to be conceived that Congress intended that a legislative requirement, giving to an owner consequential damages when his land was sought to be appropriated by a railroad company, should have application when

the United States undertakes to condemn land necessary for the improvement of navigation.

* * * * *

We have already seen that, under the well-settled common law applicable to such cases, damages not directly consequent upon the "taking," but incident to or consequent upon the construction and operation of a public improvement in a prudent and skillful manner, are *damnum absque injuria*, unless such injuries are to be compensated by the terms of the statute under which the work was prosecuted. But the insistence of the plaintiff in error is that, if the increased cost of insurance or the diversion of the current of the stream from one side of the stream to the other be consequential, the injury from overflow will be a "taking," within the meaning of the Constitution. For this the case of *Pumpelly* v. *Green Bay Co.* (13 Wall., 181) has been much relied upon. That case does undoubtedly hold that a permanent flooding of private property may be regarded as a "taking," but that case was subsequently characterized as "the extremest qualification of the doctrine" as to nonliability for consequential injuries resulting from a public improvement and without negligence. (*Transportation Co.* v. *Chicago*, 99 U. S., 642). (See also *Union Bridge Co.* v. *United States*, 204 U. S., 364.)

So in the case of *Bauman* v. *Ross* (167 U. S., 548) it is held that *Congress may direct* that when a part of a parcel of land is appropriated for public use the tribunal vested by law with the duty of assessing the

compensation or damages due to the owner shall take into consideration the injury to the rest. But Congress has made no provision for the payment of such damages as are claimed in the case at bar.

The books abound in other instances where no liability attaches for remote or consequential damages. For example, a city is not liable for inconvenience occasioned by a ditch along a street which is constructed under proper authority, even though it becomes enlarged by erosion so as greatly to impair access to adjoining property.

Lambar v. *St. Louis*, 15 Mo., 610.
Benjamin v. *Wheeler*, 8 Gray, 409.

In *Gould* v. *Hudson River R. R. Co.* (6 N. Y., 522) it was held not a taking where the railroad, running within the lines of a navigable river and below low-water mark upon piles, cut off access to the land of a riparian owner and interfered with his use of the river.

So dams constructed in a stream which indirectly injured a canal, held not a taking.

Susquehanna Canal Co. v. *Wright*, 9 W. & S., 9.
Monongahela Nav. Co. v. *Coon*, 6 W. & S., 101.

The owner of a way is not entitled to compensation for the establishment of a railroad over it, although he is inconvenienced thereby. (*Boston & Worc. R. R.* v. *Old Colony*, 12 Cush., 605.)

The construction of a high embankment by a railroad so as to interfere with the access to a house and

lot does not entitle the aggrieved party to compensation under the constitution of Vermont. (*Richardson* v. *Vt. Cent. R. R.*, 25 Vt., 465.)

In *Beseman* v. *R. R. Co.* (50 N. J. L. R., 235) it was held that a railroad company is not responsible for the incidental damages occasioned to land abutting on or near to the track, the road being run in all respects with care and skill. The plaintiff was the owner of certain lots of land in Jersey City, and the defendant built an elevated railroad track at the rear of the land within 10 feet of the dwelling houses situated thereon, and used the same for the passage of locomotives and cars in the transportation of cattle, manure, and other freight, which it was alleged rendered the houses unfit for habitation and of no use or value whatever to the plaintiff. The court said (pp. 245–246):

> When property has been incidentally injured no matter to what extent, as an unavoidable result of a public improvement, such loss has always been deemed remediless, and it has never been supposed that the property so injured was taken, in the constitutional sense, for the public use. All the public improvements in the State have been built and are now resting upon this foundation.

We have thus gone at some length into the federal and state cases on the subject of consequential damages for the purpose of refuting the assertion made in counsel's brief that the decisions mainly relied upon by the Government in its former brief

relate more specifically to damages sustained by riparian owners in the course of the improvement of navigable rivers. The cases above cited cover damages arising from public and quasi public improvements of almost every conceivable kind. In some instances they were erected by the State itself, and in others by corporations acting under proper authority received therefrom. Some of these works were for the improvement of navigable and nonnavigable streams; others for the improvement of railways, turnpikes, city streets, canals, and other highways. In some the injury was temporary, in others permanent. In some the improvements were constructed to further the general public welfare—that is, under the police power; in others they were of a semipublic nature, as in the case of railroads, etc. But whether the decisions were based upon the police powers of the State or otherwise, the courts have uniformly held that there was no *taking* of private property requiring compensation. On the other hand, the injury complained of was held consequential, and therefore *damnum absque injuria*.

Mere inconvenience or additional expense in operation does not constitute a taking.

An analysis of the case of *Pumpelly* v. *Green Bay Co.* (13 Wall., 166), upon which counsel mainly rely, shows that a liability is created to make compensation for the value of only so much land as is permanently submerged. The dictum of the learned justice delivering the opinion in that case can not, by any stretch of imagination, be said to apply to the

facts in the case at bar. This court has never afforded relief under the fifth amendment in any case except where (as in the Pumpelly and Lynah cases, *supra*) there has been such a physical invasion of the real estate of the owner as amounts to an ouster of possession. The expressions in the later cases of "substantial" or "practical destruction" or "material impairment," therefore, must be construed to mean the equivalent of such a "total destruction" as to render the land valueless for all purposes, and not mere lessening of its value.

The trial court found that—

> In order for plaintiffs to reach the county road, since this private roadway was submerged, they would have to go around on a ridge about 2 miles out of their way. The bluff they would have to go up, in order to get on this ridge, is very steep, and it is not practical to make a road that way. The destruction of this private roadway lessens the value of plaintiff's farm at least $1,700. (Rec., p. 16.)

We do not understand the words "not practical" as here used are meant to convey the idea of impossibility, for we find the petition (Rec., p. 3) alleges—

> That in order to reach the town of Ford it is, and will always be, necessary for plaintiffs and the future owners of said land to use another road leading out of the other end of the farm which passes by a very difficult and circuitous route and which makes the distance for traveling 5 miles greater to said

> town, thus causing them to travel and to haul their produce a distance of 8 miles instead of 3 to reach said town. They say that the effect of this cutting off of said farm is to render it less valuable and to damage it in the sum of at least $1,700.

Speaking of this condition of affairs, counsel in their brief (p. 5) say:

> It will thus be seen that the only outlet left for this farm, upon which complainants reside, not only to the county road leading to Ford, but in any other direction, is (except perhaps for horseback riding) by operating a private boat—an inconvenient, expensive, and unsatisfactory makeshift for transporting freight and produce as well as for personal travel.

It appears, therefore, that the only result of the cutting off access to this farm is, as counsel puts it, to render its operation more "inconvenient, expensive, and unsatisfactory."

In *Manigault* v. *Springs* (199 U. S., 473, 484–5) it was said:

> We think the rule to be gathered from these cases is that where there is a practical destruction or material impairment of the value of plaintiff's lands, there is a taking, which demands compensation, *but otherwise where as in this case plaintiff is merely put to some extra expense in warding off the consequences of the overflow.*
>
> The damage claimed by the plaintiff in the interruption of access to his lands and the im-

> pairment of his right to navigate the creek does not demand separate consideration. We have repeatedly held that where the Government of the United States has, for the purposes of improving the navigation of a river, erected piers or other structures by which access to plaintiff's land is rendered more difficult, there is no claim for compensation. (*Gibson* v. *United States*, 166 U. S., 269; *Scranton* v. *Wheeler*, 179 U. S., 141.)

In the Lynah case, *supra* (pp. 473–4), the Mills case was referred to and discussed by Mr. Justice Brewer, in the course of his opinion, as follows:

> The complaint was that the erection by the Government of what was called the "cross tides dam," running from the upper end of Hutchinson's Island to the lower end of Argyle Island, cut off all the flow of water from the stream connecting the front and back rivers, raised both the high and low water levels in the front river, and not only destroyed the facilities for draining these lands into the front river, but rendered it necessary to raise the levees around the rice fields, to prevent flooding the fields at high water. This, it was alleged, unfitted the lands for rice culture and made it necessary that new drainage into back river be provided where the water levels were suitable. Obviously, there was no taking of the plaintiff's lands, but simply an injury which could be remedied at an expense as alleged of $10,000, and the action was one to recover the amount of this consequential injury. The court rightfully held that it could not be sustained.

From the foregoing authorities it is obvious that no right of action can be predicated upon the inconvenience and expense to which defendants in error are subjected in the use and enjoyment of their farm.

No action can be maintained against the United States under the act of March 3, 1887 (24 Stat. L., 505), to recover damages in the nature of a trespass, whether proximate or consequential, because such action would necessarily "sound in tort," and therefore without the jurisdiction of the court.

But whether we view the damage complained of as consequential or otherwise, the result, so far as this suit is concerned, is the same. In any event the mere lessening of the value of the farm must be regarded as a tort and not a "taking" under the power of eminent domain, such as to give rise to an implied contract for compensation.

With the exception of the 3 acres permanently submerged, this suit was brought to recover unliquidated damages. The petition is so framed, and counsel in their brief, in effect, so admit. But whether or not we find such admission is immaterial. The test is this: What would have been the frame of the declaration if defendants in error had brought action in a common-law court against an individual on account of the lessening of the value of their land due to the impairment or destruction of the means of access to the county road? Necessarily, an action on the case—in other words, an action for damages "sounding in tort."

Railroad Co. v. *Towboat Co.*, 23 How., 209.
Mills v. *The United States*, 46 Fed., 738, 747–748.

Wright v. *Freeman*, 5 Harr. & J., 467.
Lambert v. *Hoke*, 14 Johns., 383.
Cushing v. *Adams*, 18 Pick., 110.
Shrieve v. *Stokes*, 8 B. Mon. (Ky.), 453.

Nor can claimants by any evasion in pleading create an action *ex contractu* out of one purely sounding in tort. In *Bigby* v. *United States* (188 U. S., 400) Mr. Justice Harlan, delivering the opinion of the court, among other things, said:

> It is clear that the [Tucker] act excludes from judicial cognizance any claim against the United States for damages in a case "sounding in tort." But the contention of the plaintiff is, in substance, that, although the facts constituting the negligence of which he complains made a case of tort, he may waive the tort; * * * (p. 403).
>
> The plaintiff therefore can not by the device of waiving the tort committed by the elevator operator make a case against the Government of implied contract. A party may in some cases waive a tort, that is, he may forbear to sue in tort, and sue in contract, where the matter out of which his claim arises has in it the elements both of contract and tort. But it has been well said that "a right of action in contract can not be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them upon which assumpsit can be maintained" (p. 409).

Again in the case of *Hill* v. *United States* (149 U. S., 593, 598–599), which was an action to recover damages

for the use and occupation of certain real estate in the possession of the United States, but of which the plaintiff asserted ownership, the court said:

> The United States can not be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction in this respect between contract and tort be evaded by framing the claim as upon an implied contract.

This question was considered by the Court of Claims in the *Gibson case* (29 C. Cls., 18). Judge Welden admirably expressed the rule in the following language:

> The damages complained of, while they are not remote in the sense of the law, are purely consequential, and grow out of an act upon the part of the defendants which, by the common law, would be a tort. The demand is for unliquidated damages, and if the action "sounds in tort," there is no jurisdiction in the court to determine questions affecting the merits of the controversy. The term "sounding in tort," while well known to the language of the law, is without exact and technical definition in adjudged cases.
>
> Actions *ex contractu* and actions *ex delicto* are the well-recognized divisions of the law of pleading, and all common-law proceedings fall within the clearly defined boundaries of those two forms. If the United States were suable as individuals, under the common-law practice, the grievance of which the claimant com-

plains would fall within the classification of an action *ex delicto*, unless the law will infer and imply a contract from the circumstances of the transaction.

This suit was based upon the impairment of the value of claimant's land because, in the erection of river improvements, free egress and ingress thereto was cut off from and to a public highway of travel, i. e., the Ohio River.

From the foregoing authorities it is obvious that this is not an argument against a mere informality in pleading capable of being cured, but goes to the very root of the controversy—that is, the jurisdiction of the trial court to entertain a suit for damages growing out of a tort.

In conclusion, it is respectfully submitted that the lower court erred in awarding the defendants in error the sum of $1,700 as damages on account of the lessening of the value of their farm in the manner stated, and the case should therefore be remanded to that court with instructions to revise its judgment accordingly.

JOHN Q. THOMPSON,
Assistant Attorney-General.

PERCY M. COX, *Attorney.*

17

Supreme Court of the United States

(October Term, 1909.)

Office Supreme Court U. S.
FILED
MAR 5 1910
JAMES H. McKENNEY,
Clerk.

No. 147

THE UNITED STATES - Plaintiffs in Error

vs.

CORA WELCH et al - Defendants in Error

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

Brief for the Defendants in Error

W. M. BECKNER
Of Counsel.

EDWARD S. JOUETT
For Defts. In Error.

Supreme Court of the United States

(October Term, 1909.)

THE UNITED STATES.....Plaintiff in Error

vs.

CORA WELCH, et al.....Defendants in Error

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

Brief for the Defendants in Error

STATEMENT

This action was brought by the defendants in error in the United States Circuit Court for the Eastern District of Kentucky, under the Tucker Act, to recover for injury to real estate caused by the construction, by the United States, of a dam across the Kentucky River as a part of lock No. 10, a public improvement put in under authority from Congress. It is founded upon the 5th Amendment to the Constitution: "Nor shall private property be taken for public use without just compensation."

The basis of the suit is the fact that the construction of this dam raised the water level something over twenty feet, whereby a vast pool was formed which backed the water up a small creek constituting the northern boundary of the Welch farm, and thereby covered up and destroyed three acres of the complainants' land, and also *their private deeded passway,* which ran over a neighbor's land across the creek bottom to the public highway and furnished the only means of ingress and egress for their farm. The question of riparian rights is not, as seems to be assumed by counsel for the Government, involved in the case at all. While it is true that the Kentucky River forms the western boundary of the Welch farm, yet the point where the injury occurred is located on the north side of the farm at a distance of twelve to fifteen hundred feet from the river; and the same injury would have been sustained by the owners if they had parted with the title to every foot of the western side, bounded by the river, before the Government dam was built.

As a correct understanding of the geographical facts is peculiarly essential to a correct application of the now well established principles of law governing the case, we wish to make them as plain as possible.

The Kentucky River at this point flows from south to north. The Welch farm lies on the east side of the river about three miles south of, but up the river from,

Ford, a town of twelve hundred inhabitants, situated on the same side of the river at a point where it is crossed by the Louisville & Nashville railroad. Four Mile Creek, a small stream which is ordinarily dry for a considerable portion of the time, runs into the Kentucky River from the east and forms the northern boundary of the Welch farm. The farm is thus situated in the angle made by the junction of the creek with the river. The land on the north side of the creek is owned by one Sewell, but complainants own a private road or passway across it to the Ford County Road, the public highway that leads to Ford, which is the postoffice and the shopping and shipping point for that section of Clark County. The next nearest town is Winchester, twelve miles distant. Owing to the peculiarly penned-in position of the farm in question this private right of way leading to the Ford County Road furnishes not simply the only outlet it had, but the only one which it was practicable to obtain. The farm consists of a stretch of level land flanked on the west by the river and on the south and east by a high precipitous hill, which is the western end of a great ridge that separates Four Mile Creek from the next creek up the river. The private road leaves the farm on the north—the only available place—at the foot of this hill, that is, at a point as far up the creek as it is possible; for all the way up the creek above the crossing point the Welch boundary on the

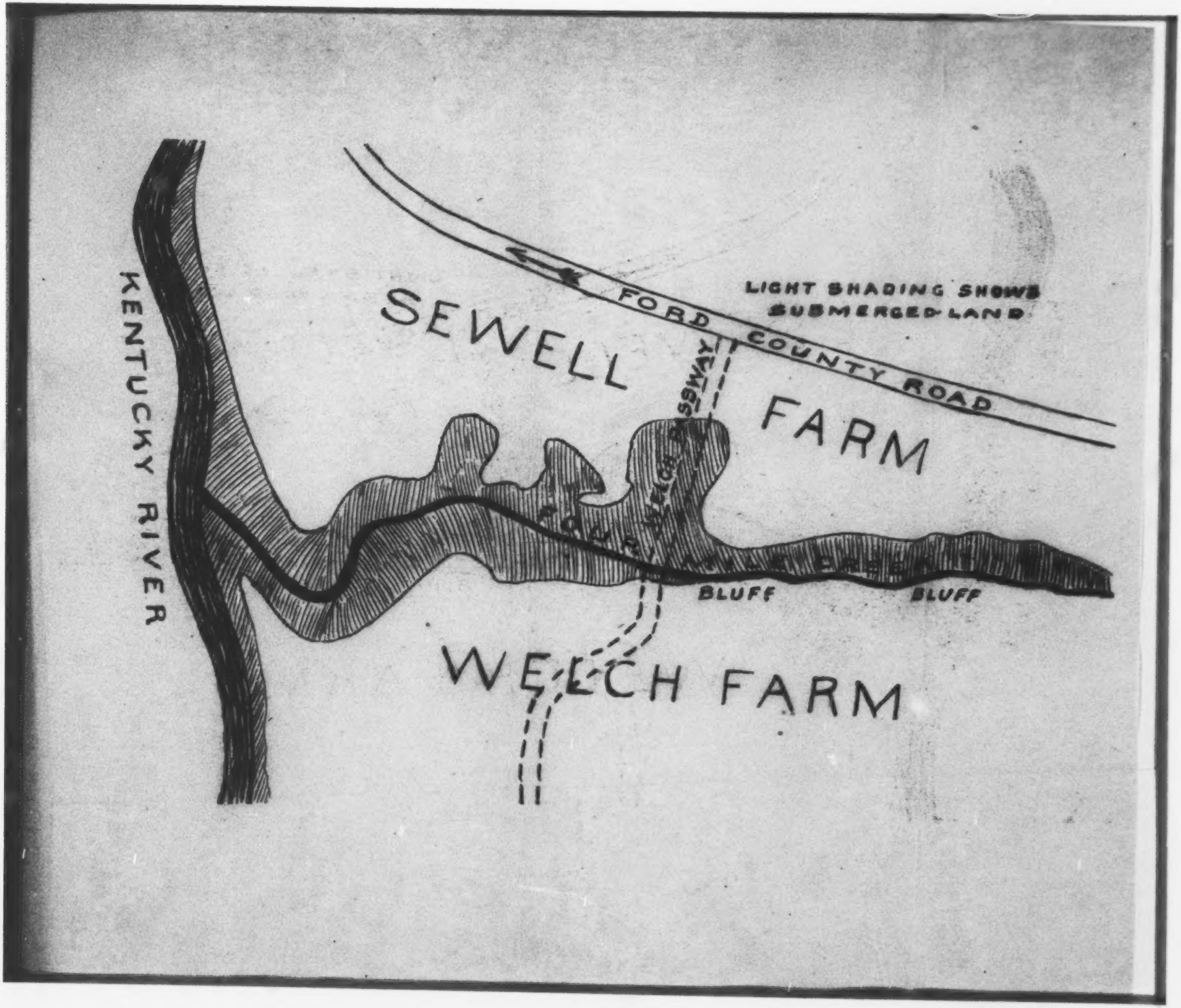
creek is a steep bluff. On the adjoining page is shown a plat of the premises in question which is a rather crude but approximately accurate reproduction, on a reduced scale, of the Government map, which was used upon the trial of the case.

An outlet on the south or east is impracticable on account of the steep hill, but if it were practicable it could not be obtained as other individuals own the land in that direction; and then it would be comparatively useless because it would go nowhere.

Counsel for the United States suggests that "the owners of the farm cannot use the private road in going to and returning from the nearest public highway, and are obliged to travel two miles instead of three hundred yards as formerly." The lower court's findings of fact, however, [all of which appear in the upper half of page 16 of the transcript of record], show that complainants are not even situated as well as counsel suggests, for they actually have no means whatever to get out by land. The court says:

> "*The only practical outlet for plaintiffs,* from their farm to the county road, *was a private roadway* running across the upper end of their bottom for about fifty yards, then over the lands of Lizzie Sewell for about three hundred yards."

And again with reference to the roundabout route suggested by counsel, the court says:


KENTUCKY RIVER
SEWELL FARM
FORD COUNTY ROAD
LIGHT SHADING SHOWS SUBMERGED LAND
BLUFF
BLUFF
WELCH FARM

"In order for plaintiffs to reach the county road, since this private roadway was submerged, they would have to go around on a ridge about two miles out of their way. The bluff they would have to go up in order to get on this ridge, is very steep *and it is not practical to make a road that way.*"

It will thus be seen that the only outlet left for this farm, upon which complainants reside, not only to the county road leading to Ford, but in any other direction, is (except perhaps for horseback riding) by operating a private boat—an inconvenient, expensive and unsatisfactory makeshift for transporting freight and produce, as well as for personal travel. The fact that plaintiffs owned this right of way across the Sewell land, that it was a good way, but that it is now completely destroyed by being overflowed, is thus shown by the court's finding of fact:

"Plaintiffs *had a right of way over the Sewell land,* which lies on the opposite side of the creek from plaintiffs' land, and adjoins the county road. *This private roadway was a good way to get out.* This roadway, by reason of a pool caused by the dam, *stands about twelve to fourteen feet under water all the time.* The lands farther up the stream are owned by other parties, and plaintiffs have no right of way over them."

The court's finding as to the value of this private roadway, which the Government's pool of water destroyed, is thus stated:

> *"The destruction of this private roadway lessens the value of plaintiffs' farm at least $1,700.* It was only about three hundred yards from plaintiffs' farm to the county road the way they had the right to go. The town of Ford is about three miles distant from their farm, and is the nearest postoffice, the nearest place to which they haul their crops."

There was also a finding of $300.00 for the destruction of three acres of land on the south or Welch side of the creek. The Government does not question the correctness of this allowance, but brings this writ of error for the sole purpose of obtaining a review of the lower court's holding that the complainants were entitled to the value of their private roadway.

ARGUMENT

Assuming as true the lower court's findings of fact, there remains the single question whether the destruction of this private right of way is such a taking as is contemplated by the 5th Amendment. This involves, however, the preliminary question whether a private passway is "property" which the Government may appropriate under the law of eminent domain. If so, then if it is taken compensation may be required.

EASEMENTS ARE SUBJECT TO THE LAW OF EMINENT DOMAIN.

It will not be gainsaid that the private right of way which one landholder owns over the land of his neighbor is an easement. In fact, of all easements it is one of the commonest and best known, particularly in the agricultural districts. And it is oftentimes, as in this case, a property interest of great value. An easement is thus defined and explained in *14 Cyc. 1139*:

> "An easement is a liberty, privilege or advantage without profit which the owner of one parcel of land may have in the lands, of another; or to state it from the opoposite point of view it is a service which one estate owes to another—or a right or privilege in one man's estate for the advantage or convenience of the owner of another estate. * * * An easement, although only an incorporeal right and appurtenant to another, the dominant, tenement, is yet properly denominated *an interest in land* which constitutes the servient tenement and the expression *'estate or interest in lands'* when used in a statute *is broad enough to include such rights, for an easement must be an interest in or over the soil.*"

That an easement is as subject to condemnation under the right of eminent domain as any other interest in lands is established by numerous authorities. The doctrine is thus stated, under the chapter on Eminent Domain, in *15 Cyc. 607*

> "Easements. An easement is an interest in land

> which is subject to condemnation, and for which the owner is entitled to compensation, as much so as if the land were taken to which the easement is appurtment."

An instructive case, which is in many respects parallel with ours, is *Ross v. Georgia C. & N. Rwy. Co., 33 S. C. 477; 12 S. E. 101.* The plaintiff was the owner of a town lot, whose only means of egress was a "private way" thirty feet in width that led to one of the streets of the town. A railroad constructed an embankment or fill across the right of way and destroyed the only means of access to the lot. The question arose as to whether the law of eminent domain applied. The court held that it did because "the private way" stood upon the same footing as "land," saying:

> "Hence, while these sections do not, in express terms, refer to the taking or condemnation of *a private right of way,* but only speak generally of 'lands,' yet it seems to me that the obvious intention was included in the term 'lands' *all rights or easements growing thereout.* Any other construction would inevitably lead either to the conclusion that the legislature did not intend to confer the right *to take or condemn a private right of way for* the construction of a railway, or that they intentionally provided no mode by which the owner of such private right of way could obtain compensation for the taking of his property. The former is so palpably asburd in its results as to forbid its adoption; for, if the right to take or condemn *a private way* for the

construction of a railroad has not been conferred, then it follows that, when a railway company in the construction of its road reaches a private way, it must stop until it can obtain the consent of the owner of such right of way, and thus a great public enterprise may be absolutely defeated by the obstinacy of some perverse individual. The idea that land—the freehold itself—may be taken under the right of eminent domain, and yet a mere easement growing out of or appurtenant to the land cannot be, seems too extraordinary—to use no harsher term—to admit of its adoption. So, too, I cannot think that the legislature would be so grossly unjust, and so regardless of its constitutional obligations, as to omit intentionally any provision for the assessment of compensation to the owner of a private right of way taken or condemned for the use of a corporation."

Deavitt v. Washington, 53 Atlantic, 563, presents an interesting application of the rule that the law of eminent domain applies as well to easements as to other interests in lands. Father and son were living in two houses upon the same lot when the father conveyed to the son the one that was further away from the street, and by certain reservations in reference to the yard the son was granted a right of way over his father's yard. Later the son's property was condemned by the county for a jail building. The use of this right of way for jail purposes was resisted by the grantees of the father. The court held that the condemnation of the son's lot

carried with it the condemnation of the appurtenant easement, saying:

> "There is a distinction between things that run with the estate in the land, as, for instance, a right of way granted by a tenant for years, and things that are attached to the land itself. In the latter case, of which easements like the one in question are a conspicuous example, when the right is once acquired, whether by prescription, grant, or covenant, it attaches to the land for the benefit of which it was acquired, and sticks to it so fast that it goes with it, regardless of privity, into all hands, even those of a disseisor. It is immaterial, therefore, whether the county acquired the easement specifically by its condemnation proceedings, for it sticks to the land, which confessedly it did acquire. But, as the bill admits that those proceedings "were in accordance" with the act authorizing them, no reason is apparent why the county did not thereby acquire the easement, if it was within the scope of the act to do so, which is not denied; *for an easement can be taken by the right of eminent domain as well as land, according to the authorities.*"

Railroad rights of way, which are in a sense private property, furnish many instances of the application of the rule. A leading case on the subject is Western Union Telegraph Co. v. Pennsylvania R. Co., 195 U. S. 540; 49 L. Ed. 312, where this court said:

> "The right of way of a railroad is property devoted to a public use, and has often been called a highway, and as such is subject, to a certain

> extent, to state and Federal control; and for this many cases may be cited. But it has always been recognized, as we have pointed out, that a railroad right of way is so far private property as to be entitled to that provision of the Constitution which forbids its taking, except under the power of eminent domain and upon payment of compensation."

Here there seemed to be no doubt that a private right of way was an interest in land which could not be taken by eminent domain without compensation; the only question was whether a railroad right of way was sufficiently "private" to come within the rule. Innumerable other authorities might be cited.

A Fee Simple Interest Is Taken In the Southern End of the Roadway Because It Is a Part of the Farm Itself.

We have been considering the destruction of complainants' passway as an easement, that is a right of way over the Sewell place: it is a fact, however, that in the court's findings it is specifically described as "*running across the upper end of their bottom for about fifty yards,* then over the lands of Lizzie Sewell for about three hundred yards." The center of the creek bed is the line between the two tracts of land. That portion of the roadway, then, which lay south of this center line

constituted a part of the farm itself and was owned by complainants in fee simple. The injury to the rest of the farm because of the taking of this smaller part (whether the whole road or the fee simple end), is a legitimate element of damage to be considered in arriving at the compensation due. For, example, if a dwelling house costing $5,000.00 be built on a town lot worth $1,000.00, and thereafter, under the law of eminent domain, the front yard be taken, whereby the usefulness and appearance of the house is greatly impaired and access to the street destroyed, manifestly the amount allowed would not be confined to the value of the front yard estimated upon the basis of its intrinsic value in proportion to the value of either the whole lot or the whole property. The correct rule would be to allow the value of the land actually taken and then add an amount represented by the impairment of the rest of the tract caused by the loss of the part taken.

An analagous case, in so far as it relates to the propriety of considering the impairment of the value of the remainder of a tract by reason of its relation to the part taken, is *High Bridge Lumber Company v. United States, et al, 69 Fed. 320.* This case was decided by the United States Circuit Court of Appeals for the Sixth District, the opinion having been written by Judge Lurton, now a justice of this court, and the case considered by Judges Taft and Severens. It was a proceeding by

the United States against the High Bridge Lumber Company for the condemnation of a certain parcel of 10¼ acres of land needed for the erection and maintenance of a lock and dam for the improvement of the Kentucky River. The commissioners fixed $3,500.00 as the value of the land actually taken and allowed the further sum of $750.00 as the damages to the adjacent land by reason of its having the ten and a quarter acres cut off. The following is the finding of the commissioners with regard to this adjacent land:

> "The adjacent land of the defendant lying down the river and west of the land condemned, is damaged to the extent of seven hundred and fifty dollars ($750). The taking and cutting this part of the land from that of the main property of the defendant prevents the advantageous use of the same as heretofore. This land was valued on the basis of $1.000.00, based on its earning power for the purpose for which it was used, and the commissioners consider that it would be damaged seventy-five per cent."

There were certain other questions in the case, for example, claims for certain purely consequential damages due to *anticipated* flooding, extra insurance rates, etc., but upon this question as to the propriety of allowing for the impairment of the value of the part not taken, the court, in *approving the finding* of the commissioners, said:

13

"The commissioners have already allowed satisfactory compensation to the owner for any *impairment of the value of the remainder of its land by reason of the relation of the part taken to the remainder of the owner's land.* This was obviously just. *A strip carved out of a tract, in such a way as to divide the remainder, might very seriously affect the enjoyment of the parts not taken.* If thereby the value of the adjacent and remaining land is impaired, *such impairment constitutes an element to be considered in assessing the value of that which is condemned.* The relation of that taken to that which is left is, therefore, *a proper element to be estimated* in assessing a 'just compensation.' "

It should be understood that, while that was an action brought under the Act of Congress authorizing condemnation proceedings, there was no prescribed measure of damages and the court distinctly announced that it was proceedings not under the Kentucky Statute, which related only to railroads, but under the rules of the common law, as are we in the case at bar.

PERMANENT OVERFLOWING IS A "TAKING" WITHIN THE MEANING OF THE CONSTITUTIONAL PROVISION.

The leading case upon the legal status of injury to real estate where its usefulness is destroyed or impaired by reason of being permanently overflowed with water due to governmental improvements, which holds such injury to be a "taking" within the meaning of the Constitution,

is the unanimous opinion of this court in *Pumpelly v. Green Bay Co., 13 Wall., 166.*

That was a suit to recover for the permanent overflowing of a tract of land caused by the erection of a dam in a river whereby the water was backed up over complainants' land. The dam was built under statutory authority of the State of Wisconsin, and the suit was based upon the provision of the Constitution of that state that "the property of no person shall be taken for public use without just compensation therefor."

The court, speaking through Mr. Justice Miller, observed that the provision in question was "almost identical in language" with the corresponding section of the Federal Constitution, and then proceeded to construe it. Discussing the contention, which is also made here, that the injury complained of was merely consequential, because incidental to a lawful governmental improvement, the court said:

> "The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government has a right to for the improvement of its navigation.
>
> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has

> received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Further answering the argument that the State had not actually appropriated the lands, the court said:

> "But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on watercourses, *equivalent to the taking* of it, and that under the constitutional provision it is not necessary that the land should be absolutely taken. *Ang. Wat. 456, a; Hooker v. N. Haven and Northhampton Co., 14 Conn., 146; Rowe v. Granite Bridge Co., 21 Pick. 344; Cannal Appraisers v. People 17 Wend., 604; Lackland v. North Mo. R. C., 31 Mo. 180; Stevens v. Prop. of Middlesex Can., 12 Mass., 466.*"

In conclusion of the discussion, and particularly of the principle announced in some of the state courts that such an injury was consequential, the court said:

> "But we are of the opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that *where real estate is actually invaded by super-induced additions of water, earth,* sand or other material, or by having any other artificial structure placed on it, *so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution* and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle."

A reference to Rose's Notes will show that this case has been cited and approved in more than fifty later ones decided by this and other courts, so that it may be taken as the established law of the land in support of which further citation of authority is superfluous.

The Authorities Relied Upon By the Counsel For the Government.

Such further discussion as may be needed to make complainants' position clear will be found in our comments on the authorities upon which the Government relies.

Counsel cites several cases and quotes from as many

more, with the apparent purpose of establishing these two somewhat similar propositions: (1) that where "private property is merely lessened in value by the erection of a public improvement and is not invaded upon," or where the owner has not "been wholly deprived of the use of same" but "it has been merely injured or its use impaired," there is no taking such as is contemplated by the amendment; and (2) that where "ingress and egress to and from private property is rendered more difficult by reason of the erection of a public improvement and the value of the property is thereby lessened" it is a consequential injury which cannot form the basis of a claim "founded upon the Constitution."

We ask the court's indulgence for a brief resume of the Government's authorities, which will show, as we believe, that they are wholly inapplicable to the case under consideration. Counsel cites, in support of the first proposition, *Transportation Company v. Chicago, 99 U. S. 635; United States v. Lynah, 188 U. S. 455; Mills v. U. S. 46 Fed. 738; Bedford v. United States, 192 U. S. 217; Manigault v. Springs, 199 U. S. 473; and C. B. & O. Ry. Co. v. Drainage Commission, 200 U. S. 561.*

Transportation Company v. Chicago, was brought to recover damages for injuries alleged to have been sustained by plaintiff in consequence of the action of the

authorities in constructing a tunnel or passage-way along the line of LaSalle Street and under the Chicago River. The plaintiffs were lessees of a lot at the point where the street met the railway and the principal injury of which they complained was that by the operations of the city they were deprived of access to their premises *during the prosecution of the work.* In the statement the court says:

> "*It is not claimed that the obstruction was a permanent one,* or that it was continued during a longer time than was necessary to complete the improvement. Nor is it contended there was unreasonable delay in pushing the work to completion, or that the coffer-dam constructed in the river, extending some thirty-five feet in front of the plaintiff's lot, was not necessary, indeed indispensable, for the construction of the tunnel.
>
> The case has been argued on the assumption that the erection of the coffer-dam, and the necessary excavations in the street, constituted a public nuisance, causing special damage to the plaintiffs, beyond those incident to the public at large; and hence, it is inferred, the city is responsible to them for the injurious consequences resulting therefrom."

It will be seen from this statement how wholly dissimilar it is to the case here under consideration. The court there also considered, as a necessary element to a recovery in such a case, that there should have been some *actual invasion* of the plaintiff's property.

In discussing the case of *Pumpelly v. Green Bay Co.,*

13 Wall., 166; 20 L. Ed. 557, and other similar cases, the court said:

> "In those cases it was held that *permanent flooding of private property* may be regarded as a 'taking.' In those cases there was a *physical invasion of the real estate* of the private owner, and a practical ouster of his possession. But in the present case *there was no such invasion.* No entry was made upon the plaintiff's lot. *All that was done was to render for a time its use more inconvenient.*"

United States v. Lynah was a suit to recover from the United States compensation for the destruction of a rice plantation, which was situated alongside the Savannah river, upon the ground that the building of the dam complained of raised the water and caused an injury which was in effect a "taking" for public use. The owner of the plantation had constructed levees along the bank through sluices in which the water was drawn on and off for irrigation purposes, the level of the land being between high and low water mark. The dam destroyed this method of irrigation and by seepage the land became boggy and useless. The injury was not so direct, as in our case, yet this court held that there was such *taking* as was contemplated by the Constitution, saying, in conclusion of an elaborate consideration of the question, wherein it discused with approval numerous passages from the Pumpelly case:

> "It is clear from these authorities that where the

> government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the 5th Amendment."

A quotation from *Mills v. The United States* appearing at page nine of the Government's brief shows that, while somewhat similar to the Lynah case, it was different because the dam complained of simply necessitated certain changes in the method of drainage. It involved some expense but was in no way a "taking."

Bedford v. United States, 192 U. S. 217; 48 L. Ed. 414, was an action by a riparian proprietor to recover for alleged injury from overflow and erosion claimed to result from the action of the Mississippi river as the consequence of a construction by the Federal government, further up the stream, of a revetment along the banks, which did not change the course of the river as it then existed and operated to prevent further changes. It was held that there was not such a taking of private property for public use as was contemplated by the 5th Amendment to the Constitution. In this case the Government works were constructed along the banks of the river and their effect was to resist erosion of the banks by the waters of the river. It was considered doubtful whether any damage to the plaintiff's land could be assigned to the works at all, but if so it was held to be a remote and incidental consequence. The court,

after discussing and quoting from the Lynah and the Pumpelly cases, said:

> "In both cases, therefore, it was said that there was *an actual invasion and appropriation of land as distinguished from consequential damage.* In the case at bar the damage was strictly consequential. It was the result of the action of the river *through a course of years.*"

Manigault v. Springs was a suit to enjoin the damning of a creek in South Carolina. There were a number of questions involved in the case growing out of contracts and compromises, but upon the main question the following summary of the court will show that the case was not similar to ours:

> "We think the rule to be gathered from these cases is that where there is a practical destruction or *material impairment* of the value of plaintiff's lands, there is a *taking* which demands compensation; but otherwise where, as in this case, plaintiff is merely *put to some extra expense in warding off the consequences of the overflow.'*

C. B. & Q. Railway Co. v. Drainage Commissioners was a suit involving the right of certain drainage commissioners in Illinois to require the C. B. & Q. Railway Co., to remove or enlarge a bridge and culvert where changed drainage conditions rendered necessary a larger opening. The court held in effect that a railroad in crossing a natural water way exercises that right sub-

ject to the burden of being ready at all times to meet such requirements of the public as changed conditions and increased use may demand, and that the enforcement of such requirement is not a "taking" of its property. It is in no respect analogous to our case.

In contradistinction to the indirect, consequential or remote injuries sued for in the above cases we call attention to the clear cut instance of "actual invasion," "physical contact" and "permanent destruction," in other words, the "taking" involved in the case at bar, where, as found by the lower court, the complainants' private right of way—a valuable property interest—"stands under twelve or fourteen feet of water all the time." With reference to the effect of its being thus permanently submerged the court further finds that "the destruction of this private roadway lessens the value of the plaintiff's farm at least $1,700.00," which is another way of saying that the passway thus destroyed was worth that much, as by its destruction the combination of farm and passway was diminished in value to that amount.

If counsel for the Government means that the damage to the *farm* is consequential because, forsooth, it is the *passway to it*, and not the *farm itself*, which is destroyed, we submit that counsel is deluding himself with a misleading confusion of terms. The easement and the farm to which it is appurtenant are linked together as the

parts of one whole, so that the destruction of a part—the passway—is as much a destruction *pro tanto* of the whole, as is the destruction of the three acres of land, whose permanent submerging, the Government concedes, entitled complainants to compensation. The specific strip of grounds over which complainants owned the absolute right of way for traveling to and from their home and which was their only means of ingress and egress is submerged for a distance of several hundred feet and completely destroyed. In part of the strip they owned the fee-simple; in the remainder an easement. The strip was taken for public use. *It* had *some value.* The court fixed its value at $1,700.00 This assessment of value, we understand, will not be reviewed. If then complainants are entitled to anything for this direct taking they are entitled to the full $1,700.00 which is an eminently reasonable estimate of the loss.

Upon the Government's other contention, that the lessening of the value of property by rendering ingress and egress more difficult is not a taking, it relies altogether upon the two well known cases of *Gibson vs. United States, 166 U. S. 269,* and *Scranton v. Wheeler, 179 U. S. 141.*

A moment's consideration will demonstrate that these two cases are wholly irrelevant, because in comparison with our case, they not only involve entirely dissimilar

facts but they are also based upon equally variant propositions of law. These cases are very similar, each involving a claim for injury caused by an interference with access from claimant's shore to the contiguous water. Stated briefly, they relate solely to what the books call the *riparian right of access to navigability*—the right of a riparian proprietor to have access, for his private navigation purposes, to the stream or water which touches his land; but this right, according to the authorities, is always held subordinate to the greater navigation rights of the general public. As a consequence, if a public improvement, in aid of better navigation, interfere with the lesser right of private navigation, even to the extent of cutting off access to the water (but without actual invasion), no absolute right of the riparian owner is affected, but only his qualified right—qualified by the contingency of a possible and proper entailment in that very way.

The principle is thus announced by Mr. Chief Justice Fuller at the outset of the opinion in the Gibson case:

> "All navigable waters are under the control of the United States *for the purposes of regulating and improving navigation*, and although the title to the shore and submerged soil is in the various states and individual owners under them, *it is always subject to the servitude* in respect of navigation created in favor of the Federal government by the Constitution."

And thus at the conclusion:

> "Moreover, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in that regard. The legislative authority of these works consisted simply in an appropriation for their construction, but this was an assertion of a right belonging to the government, to which riparian property was subject, and not of a right to appropriate private property, not burdened with such servitude, to public purposes.
>
> In short, the damage resulting from the prosecution of this improvement of a navigable highway for the public good was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject."

In that case reference to the findings of fact shows that the claimant owned a tract of about twenty acres situated on Neville Island in the Ohio river with a frontage of one thousand feet on the north or main navigable channel of the river, and that claimant had a landing on that side. The offending dike, constructed by the Government, merely prevented free ingress and egress to and from the land and only for certain portions of the year. It was shown in finding eight that "there was no water thrown back on claimant's land by the building of said dike, and that said dike has not itself come into physical contact with claimant's land and has not been

the cause of any such physical contact in any other way."

A summary of this case by this court in the Scranton case gives the other enlightening facts:

> "It was further found that the plaintiff's access to the navigable part of the river was not entirely cut off; that at a nine-foot stage of water, which frequently occurred during November, December, March, April and May, she could get into her dock in any manner, while from a three-foot stage of water she could communicate with the navigable channel through a chute, and at any time haul out to the channel by wagon; that no water was thrown back on the land by the building of the dike; and that the dike itself *did not come into physical contact with the land,* and was constructed in the exercise of a claimed right to improve the navigation of the river."

There was *no taking of any part of complainant's farm,* or any interest therein; but the only injury done was *an interference with her use of the stream for navigation purposes* caused by the improvement of the stream for better navigation by the public. It amounted at most to simply making complainants' use of the stream more inconvenient. In any event, however, her claim was based upon the rights incident to her riparian ownership; and the court decided that her riparian rights were subject to the more important servitude in respect to navigation in favor of the Federal government.

The other case, *Scranton v. Wheeler,* was a suit by a

riparian owner to prevent interference with his riparian rights caused by a pier that was erected by the United States on land submerged under navigable water, the title to which was owned by the riparian proprietor. The government pier destroyed his access to the navigable water. The court held that this situation did not entitle him to compensation under the 5th Amendment since the title to the land, whether owned by the riparian owner or by the state, was acquired and always held subject to the right of the public in the navigation of such waters. The court thus states the proposition there under consideration:

> "The vital question, therefore, is the one heretofore mentioned, namely, whether the prohibition in the Constitution of the United States, of the taking of private property for public use without just compensation, has any application to the case of an owner of land bordering on a public navigable river *whose access from his land to navigability is permanently lost* by reason of the construction of a pier resting on submerged lands *away from, but in front of, his upland,* and which pier was erected by the United States, not with any intent to impair the rights of riparian owners, but for the purpose only of improving the navigation of such river."

That the court throughout that case was considering only the rights of plaintiff *as riparian owner* is shown by this quotation in which the question is stated:

"In the light of these adjudications can it be held that Scranton, the plaintiff, is entitled, by reason of the construction of the pier in question, to compensation for the destruction of his right, *as riparian owner, of access from his land to the navigable part of the river immediately in front of it.*"

In answering the question the court recognizes, even in the case of a riparian owner, the distinction for which we contend between an injury to his *fast land,* as it is called, and that injury which results from an interruption of his right to the use of the stream, the latter right being always held subject to a servitude in the public for the making of such improvements as will aid the public navigation. Note this significant language:

"So that, whether the title to the submerged lands of navigable waters is in the state or in the riparian owners, it was acquired *subject to the rights which the public have in the navigation of such waters.* The *primary use of the waters* and the lands under them *is for purposes of navigation,* and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged land in front of his upland bordering on a public navigable water, *his title is not as full and complete as his title to fast land* which has no direct connection with the navigation of such water. It is a *qualified title, a bare technical title,* not at his absolute disposal, *as is his upland,* but to be held *at all*

times subordinate to such use of the submerged lands and of the waters flowing over them *as may be consistent with or demanded by the public right of navigation.*"

Note again:

"The riparian owner acquired the right of access to navigability *subject to the contingency* that such right might become valueless in consequence of the erection, under competent authority, of structures on the submerged lands in front of his property for the purpose of improving navigation."

The court in announcing its final conclusion, rested it not so much on the nature of the injury, as upon the character of complainants' title:

"We are of opinion that the court below correctly held that the plaintiff *had no such right of property in the submerged lands on which the pier in question rests as entitles him,* under the Constitution, *to be compensated for any loss of access from his upland to navigability,* resulting from the erection and maintenance of such pier by the United States in order to improve, and which manifestly did improve, the navigation of a public navigable water."

The distinction between the case at bar and the Gibson and Scranton cases is simple, clear-cut and controlling. The injury in the two cases cited by counsel relate only to a riparian owner's materially qualified right of access to the use of the stream for navigation purposes.

In the case at bar the demand asserted is not based

upon any riparian ownership whatever. Complainants' navigation of the stream has not been interferred with and they make no claim on that account. On the contrary the injury sued for grew out of the physical invasion and actual destruction of their right of way for *land travel*, occurring twelve hundred feet from the river.

We earnestly insist that no good reason is shown for annulling the action of the learned judge of the lower court granting compensation to complainants for the serious loss they sustained by the Government taking their property for public uses.

Respectfully submitted,

EDWARD S. JOUETT,

For Def'ts in Error.

W. M. BECKNER,

Of Counsel.

Supreme Court of the United States

THE UNITED STATES, ...Plaintiff in Error

vs.

CORA WELCH, ET AL., ...Defendants in Error

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

Response of Defendants in Error to Reply Brief of Plaintiff in Error

Before undertaking to respond to the argument of counsel's reply brief, we wish, in passing, to notice their statement (Reply Brief p. 3) that this case embraces two claims—(1) the taking of the three acres flooded and (2) the damages to the farm "because access to the town of Ford was rendered more difficult by reason of the flooding of the said three acres of land;" and their further statement, following that alleged classification of claims, that since the filing of the pleadings "a new

element of damage has been injected into this cause by defendants in error, namely, damages arising from the destruction of a so-called easement over the land of Lizzie Sewell, etc." It is also suggested that the record does not show that this was a deeded passway.

The derivation of plaintiff's title to this private roadway is not shown in the printed transcript of the record, though it was shown in the proof; but this is wholly immaterial, as its value to the farm would be the same, whether the title was acquired by prescription or by deed. The *material fact* is that plaintiffs *owned* this easement, as was found and thus stated by the court at page 16 of the transcript:

> "*Plaintiff had a right of way over the Sewell land,* which lies on the opposite side of the creek from plaintiff's land, and adjoins the county road. This private roadway was a good way to get out. This roadway by reason of a pool caused by the dam stands about twelve to fourteen feet under water all the time."

This private roadway of plaintiff over the Sewell land is thus further described by the court, at the same page:

> "The only practical outlet for plaintiff, from their farm to the county road, was *a private roadway,* running across the upper end of their bottom for about fifty yards, *then over the lands of Lizzie Sewell for about three hundred yards.*"

In addition to the allegations in the original petition,

it is also set forth in the amended petition (Transcript p. 6) that this private roadway leading across the creek to the public highway is a part, and a material part, of the farm in question:

> "Plaintiffs say further that their own roadway, referred to in said petition as leading to the county road, is, and was when said dam was erected, a valuable part of plaintiff's farm, described in said petition, and that its obstruction and destruction, as set out in the petition herein, took from said farm a material part of the value of said farm."

The court in its judgment (Transcript p. 7) distinctly allows "the sum of $300.00 for the three acres of land taken, and the further sum of $1,700.00 *for the damage to the right of way,*" meaning for its total destruction since the court finds (Transcript p. 16), as above shown, that "*the destruction of this private roadway* lessens the value of plaintiff's farm at least $1,700.00."

That the rights of plaintiffs growing out of the destruction of this private roadway have heretofore been recognized even by counsel for the Government as the only question in the case, is shown by the following statement of the question at the outset of their original brief:

> "Plaintiff in error seeks to reduce a final judgment of $2,000.00 to $300.00, upon the ground that $1,700.00 was awarded *for the destruction* by the Government of the use *of a private road which had afforded convenient access between the farm of defendants in error and the public highway.*
>
> The question involved is, whether the Government,

in view of the fifth amendment of the Constitution, is liable to the owners of the farm, which has been lessened in value *in consequence of the flooding of a private road* by the erection of structures to improve the navigable capacity of a river."

In the light of the foregoing extracts from the pleadings, the court's finding of facts, the judgment, and counsel's original brief we fail to understand counsel's statement, that, by the assertion of this claim for the destruction of the private roadway across the Sewell bottom, the effect of which is, and was throughout the case, the only matter in contest," a new element of damages has been injected into this cause."

The questions in this case, as now understood by counsel for the Government, are thus stated (Reply Brief, p. 3):

"The issues before the court, therefore, are—

1. Whether, instead of being a "taking" of property within the constitutional meaning, the damages complained of are not *merely consequential;* and

2. Whether the suit is one *"sounding in tort"* and consequently without the jurisdiction of the trial court."

We will consider these in the order named.

I.

Are the Damages Merely Consequential in the Legal Meaning of that Term?

In their discussion of this question counsel devote many pages to establishing the proposition that "consequential damages" are not recoverable under the provision of the constitution allowing just compensation. This is the rule only where there is no actual taking, and a careful examination of the long array of authorities cited by counsel in favor of the proposition discloses that they are all cases where there has been no actual invasion of claimant's property. They relate to consequential damages resulting from the change of grade in a public street; the building of a turnpike which diverts some of the travel from an older turnpike; the vacating of a street; the interference with a riparian owner's right of access to navigability by public improvements in the stream; interference with fishing; a change in the flow of water in a navigable stream caused by government improvements; an increase in the cost of insurance; and other similar instances of what is known as consequential damages. These very authorities, however, constantly emphasize the distinction between cases of invasion and no-invasion, and recognize the principles for which we contend, that wherever there is an actual physical in-

vasion compensation is due, and the law then fixes the measure of that compensation to be the value of the part taken plus the damage to the remainder of the property resulting from such taking. In support of the above statement we call attention to several of counsel's own quotations:

In Cooley on Constitutional Limitations, the necessity for *non-invasion* in order for the damages to be consequential is thus stated (Reply Brief, p. 5):

> "Any proper exercise of the powers of government which does not *directly encroach upon the property of an* individual or *disturb him in his possession or enjoyment,* will not entitle him to compensation or give him a right of action. * * * * * This principle is peculiarly applicable to those cases where property is appropriated under the right of eminent domain. It must frequently occur that a party will find his rights seriously affected, though *no property to which he has lawful claim is actually appropriated.*"

In the quotations from Sedgwick on Statutory and Constitutional Constructions (Reply Brief, p. 8) the author says that "it seems to be settled that to entitle the owner to protection under this clause (the right to take under the power of eminent domain) *the property must be actually taken in the physical sense of the word.*"

In the quotation from *Louisville & Frankfort R. R. vs. Brown, 17 B. Mon. 763,* the reason for disallowing the

claim for damages caused by the construction of a wall in the street, and also the distinction between the obstruction of a public street and of a private way, like the one here in controversy, is thus stated (Reply Brief, p. 9):

> "*No right of property is invaded; no property of the appellees has been taken for public use without compensation.* Their right to the use of the street, even according to the most comprehensive definition of that right, is held and must be exercised in subjection to the equally well established right of the municipal power of the town or city to make such appropriation of the streets as, in their opinion, will best promote the interests and business of the local community."

In the case of *Hollister v. The Union Company* (9 Conn. 436), from which counsel give a quotation of four and a half pages, the question was as to plaintiff's right to recover for the washing of his land caused by the erection under public authority of piers in a river. The following portion of this quotation (Reply Brief p. 19) gives the meat of the decision, including a re-statement of the proposition, discussed in our original brief, as to the limitations upon a riparian owner's property rights:

> "*The defendants have not directly invaded the property of the plaintiff.* They have not taken the property of the plaintiff for public use without just compensation; they have not, therefore, brought themselves under the constitutional interdiction; but

> they have, under the sanction of the authority of the legislature, to which appertained the power of regulating a public navigable river, operated upon this river so as to produce an inconvenience—a remote and consequential injury, to the plaintiff's land. For such an injury no action can be sustained."

In *Currie v. Waverly, etc., Railroad Co.,* (23 Vroom, 392), the following quotation (Reply Brief, p. 19) states by implication the very ground upon which we claim to be entitled to recover:

> "It is an established rule in law, in proceedings for condemnation of land, that the just compensation which the landowner is entitled to receive for his lands and damages thereto *must be limited to the tract a portion of which is actually taken.* The propriety of this rule is quite apparent. It is solely by virtue of his *ownership of the tract invaded* that the owner is *entitled to incidental damages.*"

We hold that in our case the actual physical invasion took place when the water permanently overflowed and destroyed three acres of the Welch farm, including the fifty yards of its private roadway on the Welch side of the creek and the three hundred yards on the Sewell side, this latter part being an easement over the Sewell lands. We also insist that the easement and the farm together constitute one piece of property, the two being component parts of one whole, whose value depends in great measure upon the continuance of the union. If so, then the taking of the easement entitled us to recover the

diminution in value of the whole caused by such taking.

But counsel seem to treat this private roadway (which the pool utterly destroys by permanently submerging it under twelve to fifteen feet of water) as something entirely separate and distinct from the farm, and hence insist that the damage to the farm is merely consequential; but this position, if correct, would not avail them for it is found by the court (Transcript p. 16) that the roadway on the Welch side of the creek is submerged for about fifty yards, and while this is included in the three acres, the court only allowed $300.00 for the value of the three acres and $1,700.00 for the damages to the rest of the farm by the taking of the roadway, fifty yards of which was a part of the farm.

Another reason why treating the farm and its easement separately would not avail the Government is that the value of the easement, which was taken and entirely extinguished, would still have to be allowed; and this value would necessarily mean its value to the farm, for it had no other value and existed for no other purpose.

So whether the two be considered separately or together, and whether the farm was lessened in value because of the destruction of the fifty yards of its private roadway on the Welch side of the creek or the three hundred yards on the Sewell side, the result is the same, that the destruction of the roadway lessened the value

of the farm, and that the court found its diminution in value occasioned by taking its outlet to be $1,700.00|

In order to refresh the court's recollection as to the established rules of law applicable to these facts we will consider, as briefly as may be, these propositions:

1. Damages to the residue of a tract, caused by the taking of a part under the power of eminent domain, are allowable in ascertaining just compensation.

2. The Welch farm and its private roadway, or easement over the Sewell bottom, should be considered as one piece of property, so that the taking of the easement entitled the owner to the loss in value of the farm caused by such taking.

3. If the second proposition were disregarded the court's finding of $1,700.00 could still be upheld either upon the idea that the easement was itself worth that much, or if not, that the damage to the farm by destroying the fifty yards of roadway on its side of the creek—conceded in any event to be a part of the farm itself—amounted to that sum.

DAMAGES TO THE RESIDUE OF A TRACT CAUSED BY TAKING A PART ARE ALLOWABLE IN FIXING JUST COMPENSATION.

In addition to the quotation, at page 11 of our original brief, from *High Bridge Lumber Co., vs. United States* (69 Fed. 320), we refer to the decision of this court in *Sharp vs. United States, 191 U. S. 341; 48 L. Ed. 211,*

which is also a pertinent authority upon the next proposition. In this case one person owned three separate and distinct farms, one of which was taken under the power of eminent domain. This latter was situated on the opposite side of the pike and had never been used in connection with the other two, one of which was bought only ten days prior to the institution of the condemnation proceedings. The question was whether the three tracts constituted one farm so as to entitle the owner to damages to the other two because of the taking of one.

It was conceded throughout the case that such damages were allowable if the three farms could properly be considered as one single piece of property, but this claim was denied because they were "absolutely separate and independnt farms, having no necessary relation with each other, and the farming on each had been conducted separately, and each had its own house and outbuildings." Upon the question now under discussion, the court said:

> "If the remaining land had been part of the same tract which the government seeks to condemn, then *the damage to the remaining portion of the tract taken,* arising from the probable use thereof by the government, would be a proper subject of award in these condemnation proceedings. * * * Upon this subject it was well stated by Judge Gray, delivering the opinion of the circuit court of appeals, as follows:
>
> '*Depreciation in the value of the residue* of such a tract may properly be considered as allowable dam-

> ages, in adjusting the compensation to be given to the owner for the land taken.' "

In the opinion by the Circuit Court of Appeals in the same case, 112 Fed. 693; 57 L. R. A. 932, which was approved throughout by this court, Judge Gray said:

> "It is not denied that in rendering the "just compensation" secured by the Constitution of the United States to the citizen whose property is taken for public uses it is right and proper to include the *damages in the shape of deterioration in value which will result to the residue of the tract* from the occupation of the part so taken. In applying this rule, however, regard is had to the integrity of the tract *as a unitary holding* by the owner."

We have found no case that denies the rule above shown. Counsel claim, however, that the damage to the farm itself consists merely of "inconvenience" in getting to Ford under the new status caused by the destruction of the outlet. They are evidently confused as to the doctrine of "inconvenience." It only applies where there is no actual taking and it cannot be substituted for a taking; but when there is a taking of a part, then "inconvenience" to the residue becomes one of the legitimate, and in fact most natural and frequent, elements of damage to the residue.

The Welch Farm and its Private Roadway Should be Considered as One Property.

It seems self-evident that this easement and the farm to which it belongs together form a single piece of property. While the record does not disclose when the private way was acquired, it is presumed to have been coeval with the existence of the farm itself in its present form as the farm is practically useless without it. But unity in time of acquisition is a comparatively unimportant factor, the controlling consideration being unity of use. Here the two were constantly and necessarily used together, the relation between the two being so close that if separated one became entirely valueless and the other materially impaired.

Discussing this question in *Sharpe v. United States*, supra, this court said:

> "It is often difficult, when a part of a tract is taken, to determine what is a distinct and independent tract; but the character of the holding, and the distinction between the residue of a tract whose integrity is destroyed by the taking, and what are merely other parcels or holdings of the same owner, must be kept in mind in the practical application of the requirement to render just compensation for property taken for public uses. How it is applied must largely depend upon the facts of the particular case, and the sound discretion of the court. All the testimony in this case tends to show the *separateness of this tract*, which was the subject of the

condemnation proceedings. It had never been farmed or *used in connection with either of the other farms* owned by the plaintiff in error. It was in no way *reasonably or substantially necessary to the enjoyment of the other two tracts.*

The converse of these facts is presented by the farm and easement in the case at bar.

The most complete discussion of this question we have found is an exhaustive editorial note to the report of opinion of the Circuit Court of Appeals in this case in 57 L. R. A., 932. The editor's introduction to the note thus outlines the principles established by the cases:

> "The cardinal rule in determining whether damages should be limited to the piece of ground taken in eminent domain, or extend to other portions of land owned by the same party, seems to be that *unity of use* determines the question. It is also affected by purpose, and it may be affected by character of holdings and title. The question of derivation of title is an important factor in some cases, but is usually regarded as subordinate to the unity of use."

Further along he says:

> *Where the parcels are a part of the unit, adapted for a single use, making the enjoyment of a part depend on the use of the other,* the whole will be considered in estimating damages to a part."

A pertinent case is *Westbrook v. Muscatine N. & S. R.*

Co., (Iowa) 88 N. W. 202, of which the following digest is given in the above note:

> "Where children owned land in several different sections, subject to the life estate of their parents, and the father owned, in his own right, several tracts, intervening between the tracts owned in fee by the children, *but had given a private right of way over his land for the use of the whole,* and the tracts were *all used together* as one farm, it was held, in proceedings to condemn a right of way over a part of the land, that if the several parcels of real estate that were claimed to be injured as an entire farm had such *a connection or relation of adaptation, convenience, and actual and permanent use,* as to make the enjoyment of the parcels or tracts from which the right of way was taken reasonably and substantially necessary to the enjoyment of the parcels not so touched by the right of way, in the most advantageous manner in the business in which it was at the time used, and *if such tracts were dependent upon each other in the use to which they were then put,* they would constitute one farm.

In *Potts v. Penn. S. Valley R. Co., 119 Pa. 278; 13 Atl. 291,* it was said:

> "So, if one buy a farm in separate contiguous portions from different persons, but occupy the whole in a body for farm purposes as one farm, the damages for the appropriation of a part, or even the whole, of one of the original pieces, will be assessed upon the injury done to the whole tract."

In introducing the discussion of this subject in the case of city property, the editor says:

"It seems hard to formulate a rule that will cover all cases where property in a city is divided by highways, railroads, or intervening property, and a portion of it is condemned or damaged. The general rule seems to be that where the use of property is necessary for the maintenance and successful running of a plant, and a detached portion is injured, damages may be allowed for injuries to the whole. So where it is a homestead and used as a whole for agricultural purposes."

He thus comments upon an interesting Minnesota case:

"In *Peck v. Superior Short Line R. Co., 36 Minn. 343, 31 N. W. 217,* the general rule is stated to be that in condemnation proceedings, to constitute unity of property between two contiguous, but prima facie distinct, parcels of land, there must be such *a connection or relation of adaptation, convenience, and actual and permanent use between* them as to make the enjoyment of the parcel taken *reasonably and substantially necessary* to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used."

At the conclusion of this exhaustive note will be found this "summary":

"The general rule is that where property is so situated that it is used as a unit, and *each part is dependent upon the other,* the damages will not be limited in eminent domain to the particular pieces taken, but *will extend to the whole.* This seems to be the general rule whether applied to farm, to city prop-

erty, or to a plant. In applying this rule it seems that a purchase of property in several parcels, that are separated by highways, will not be regarded as a unit where the use as a whole is *only in contemplation.* * * * Government subdivisions, section lines, and plat lines are of no consequence if the property is in a body and *used as one tract.* So, farms that are separated by highways, railroads, or other property, may still be treated as one farm *where each piece is a necessary adjunct of the other;* and so, even where a plant extends over several blocks that are *divided by streets,* if each piece is necessary for the actual operation of the plant, the whole plant will be regarded as damaged in condemning a part."

The mere statement of the facts in our case shows that under the authorities the two interests here under consideration—the Welch farm and the easement which furnishes its only outlet—by virtue of their unity in use and ownership and of their necessary connection and absolute inter-dependence, are in fact, and should be treated in law as, a single piece of property.

THE SAME AMOUNT WOULD NECESSARILY BE ALLOWED EVEN IF THE FARM AND THE EASEMENT WERE NOT CONSIDERED AS ONE PIECE OF PROPERTY.

(a) The easement, which constitutes one end of the private roadway, was totally destroyed rendering compensation equal to its value necessary. This point was argued in our original brief and is not controverted by counsel. But this easement had no value except in rela-

tion to the farm, and the trial court found this value to be $1,700.00.

(b) If the easement had not been touched the outlet was still destroyed by the submerging of fifty yards of roadway on the Welch side. This was admittedly a part of the Welch farm, and of the *three acres for whose value* the court allowed $300.00; but there remained the loss in value to the farm occasioned by the taking of this three acres, or rather of such portion of the three acres as constituted the means of outlet, and this loss the court fixed a $1,700.00. It is immaterial for which the allowance was made. The diminution in value of the farm was the same, no more and no less, whether the north portion, or south portion, or all, of the private roadway was taken.

II.

This Action Does not "Sound in Tort"

Counsel open their discussion of this branch of the case with these surprising statements (Reply Brief p. 30):

> "But whether we view the damage complained of as consequential or otherwise, the result, so far as this suit is concerned, is the same. In any event the mere lessening of the value of the farm must be regarded as a tort and not a "taking" under the power of eminent domain, such as to give rise to an implied contract for compensation."

They undertake to support this position by showing that our claim is for "unliquidated damages" and that if an individual had been sued by lessening the value of the farm in the way claimed it would have been, as they say, "necessarily an action on the case—in other words, an action for damages 'sounding in tort.'"

Exactly the contrary is the holding of this court in the leading case of *United States vs. Great Falls Mfg. Co., 112 U. S. 545; 28 L. Ed. 527;* and the rule has never been changed.

This was an appeal from a judgment of the Court of Claims "in favor of the Great Falls Mfg. Co, a corporation of the state of Virginia, for the sum of $15,962.00 as compensation for all past and future use and occupation by the United States for certain land, water rights and privileges claimed by that Company, and all consequential damages which it may legally assert, by reason of the execution of a certain one of the plans adopted by the Government for supplying the cities of Washington and Georgetown with water."

Statutory proceedings for the condemnation of the plaintiff's property rights, which it will be seen included easements as well as land, were instituted, but subsequently abandoned, and the Government, under Acts of Congress, took possession of the property. The claim was based upon the provision of the Constitution relied

upon in the present case. In the unanimous opinion delivered by Mr. Justice Harlan, this court said:

> "The making of the improvements necessarily involved the taking of the property, and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the Government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by the Constitution (upon which question we express no opinion) there is no sound reason why the claimant might not waive that right, and, *electing to regard the action of the Government as a taking under its sovereign right of eminent domain, demand just compensation. Kohl vs. U. S., 91 U. S. A. 374.* In that view, we are of opinion that the United States, having by its agents, proceeding under the authority of an Act of Congress, taken the property of the claimant for public use, *is under an obligation, imposed by the Constitution, to make compensation.* The law will *imply a promise to make the required compensation,* where property, to which the Government asserts no title, is taken pursuant to an Act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government as well as with common justice, *the claimant's cause of action is one that arises out of implied contract,* within the meaning of the statutes which confers jurisdiction upon the Court of Claims, of actions *founded upon any contract, express or implied,* with the Government of the United States."

The foregoing opinion is so clear and conclusive of this question that further argument seems needless; and it is directly in point because the Tucker Act, under which we are proceeding, gives to the district and circuit courts, according to the amount involved, jurisdiction concurrent with the Court of Claims. This case has been uniformly followed and approved whenever this question has arisen.

So far as the question of unliquidated damages is concerned, it will be recalled that the Tucker Act distinctly authorizes actions upon claims founded "upon any contract, *expressed or implied,* with the government of the United States, or for *damages, liquidated or unliquidated, in cases not sounding in tort,* in respect of which claims the party would be entitled to redress against the United States either in a court of law, or admirality if the United States were suable."

Counsel rely upon two cases decided by this court, neither of which is in point, and both of which are readily distinguishable from the case of the *United States vs. Great Falls Mfg. Co.,* supra, which case each of them recognizes and reaffirms. These two cases are *Hill vs. United States, 149 U. S. 593; 37 L. Ed. 862;* and *Bigby v. United States, 188 L. Ed. 400; 47 L. Ed. 519.* The Hill case was an action to recover from the United States the value of its use and occupation of certain land claimed by the plaintiff. The Government *denied the title of the*

claimant, and this court held that the circuit court was without jurisdiction because there had been no recognition upon the part of the Government of the plaintiff's ownership and therefore if the plaintiff owned the land the *Government's action was tortious and it a trespasser,* saying:

> "An action in the nature of assumpsit for the use and occupation of real estate will never lie where there has been no relation of contract between the parties, and where the possession has been acquired
>
> and maintained under a different or adverse title, or where it is tortious and makes the defendant a trespasser."

The court held that its decision was based upon the case of *Langford vs. United States, 101 U. S. 341,* saying:

> In *Langford vs. United States,* supra, it was accordingly adjudged that, when an officer of the United States took and held possession of land of a private citizen, *under a claim that it belonged to the government,* the United States could not be charged upon an implied obligation to pay for its use and occupation."

It also added:

> *"It has since been held that if the United States appropriate to a public use land which they admit to be private property, they may be held, as upon an implied contract, to pay its value to the owner. United States vs. Great Falls Mfg. Co., 112 U. S. 545 (28: 846) and 124 U. S. 581 (31: 527).* It has likewise been held that the United States may be sued

in the Court of Claims for the use of a patent for an invention, *the plaintiff's right in which they have acknowledged. Hollister v. Benenict & B. Mfg. Co. 113 U. S. 59 (28:901); Unitel States v. Palmer, 128 U. S. 262 (32:442).* But in each of these cases *the title of the plaintiff was admitted,* and in none of them was any doubt thrown upon the correctness of the decision in Langford's case. See *Schillinger v. United States, 24, Cr. Cl. 278.* The case at bar is governed by Langford's case."

It will be observed that in this case there was a dissenting opinion by Mr. Justice Shiras, who believed that the case was founded upon an implied contract even if the government did deny the title of plaintiff and occupy the position of a *quasi* trespasser. Independently, however, of that distinction between those two opinions, it remains that the case of the *United States vs. The Great Falls Mfg. Co.*, supra., was distinctly recognized as properly stating the rule in a case where the Government admitted the property taken to be private property.

The other case cited by counsel (*Bigby vs. United States,* supra) was one of tort pure and simple. It was a suit for negligence against the United States to recover $10,000.00 damages on account of certain personal injuries received by the plaintiff while entering an elevator that was in use in the United States postoffice building in Brooklyn. It was a suit under the Tucker Act, and the Government demurred to the petition on the ground that

the court had no jurisdiction of either the person or subject matter, and that it did not state facts sufficient to constitute a cause of action against the United States. The demurrer was sustained. The question was whether the action was upon an implied contract or sounded in tort. The opinion is a complete and learned discussion of the question from every standpoint. The court held, in an opinion by Mr. Justice Harlan, that the Government was not responsible for the unauthorized acts of its officer when those acts were in themselves torts, and that the court had no jurisdiction of this suit for negligence as it sounded in tort. In distinguishing this case, however, from the *United States vs. Great Falls Mfg. Co., supra,* and other cases like the one at bar, the court said:

> "Cases of this kind are to be distinguished from those *in which private property was taken or used by the officers of the government with the consent of the owner, or under circumstances showing that the title or right of the owner was recognized or admitted.* As, in *United States v. Russell, 13 Wall. 623, 626, 20 L. Ed. 474,* which was an action to recover for the use of certain steamers used in the business of the government pursuant to an understanding with the owner that he should be compensated; or, in *United States v. Great Falls Mfg. Co., 112 U. S. 645, 28 L. Ed. 846, 5 Sup. Ct. Rep. 306,* in which it appeared that certain private property was appropriated by officers of the government for public use, *pursuant to act of Congress, the title of the owner being recognized or not disputed;* or, in *United*

States v. Palmer, 128 U. S. 262, 269, 32 L. Ed. 442, 9 Sup. Ct. Rep. 104, which was an action to recover for the use of a patent which the government was invited by the patentee to use. In all such cases the law *implies a meeting of the minds of the parties, and an agreement to pay for that which was used for the government, no dispute existing as to the title to the property used.* The important fact in each of those cases was that the officers who appropriated and used the property of others *were authorized to do so, and hence the implied contract* that the government would pay for such use."

In the case at bar, the improvement was not the unauthorized or tortious act of a Government employe, but was made under Acts of Congress; and there was no question but that the Welch farm and its easement, which were taken and appropriated by the government, were private property to which the Government claimed no title, so that our case is on all fours with the rule laid down in the Great Falls Mfg. Co., case which has never been departed from in any later case.

This identical question, however, was exclusively considered by this court in the case of *United States vs. Lynah, 188 U. S. 446,* which, like our case, was brought in the circuit court under the Tucker Act, was based upon the 5th Section of the Constitution and sought to loss through one of its public improvements, was liable recover for the taking and damaging of land by overflow upon the theory that the United States, in causing this

as upon an implied contract. In that case, as in ours, it was contended that the circuit court had no jurisdiction because the acts complained of were tortious.

The court, after reviewing the Great Falls case and all others bearing upon the subject, sustained the jurisdiction on the ground that the suit was properly based upon an implied contract, saying:

> "The rule deduced from these cases is that when the government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates."

We again earnestly insist that the circuit court had jurisdiction, that the court properly allowed for the taking of the private roadway, and that the sum of $1,700.00 fixed by the judge should stand.

Respectfully submitted,

EDWARD S. JOUETT,

For Defendants in Error.